119-696

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 357. 103

LUCIUS L. HUBBARD, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW ENGLAND, AND WESTERN INVESTMENT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 18, 1883.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Lucius L. Hubbard, of Cambridge, in the county of Middlesex, in the Commonwealth of Massachusetts, plaintiff, and the New York, New England and Western Investment Company, a corporation duly established under the laws of the State of Illinois, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

JOHN G STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
THOMAS L. NELSON, *U. S. Dist. Judge.*

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this first day of September, A. D. 1883.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of October, in the year of our Lord one thousand eight hundred and eighty-two, the fifteenth day of said October happening on a Sunday.

Before the Honorable John Lowell, circuit judge.

LUCIUS L. HUBBARD, of Cambridge, in the county of Middlesex, in the Commonwealth of Massachusetts, Plaintiff,

v.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY, a corporation duly established under the laws of the State of Illinois, Defendant.

In an action of contract.

The writ in this cause is dated the eleventh day of April, A. D. 1881, and is made returnable before the justices of the supreme judicial court of the Commonwealth of Massachusetts then next to be holden at Boston, within and for the county of Suffolk, on the second Tuesday of September, A. D. 1881. This cause, after entry in said supreme judicial court, was removed to this circuit court and here entered at the October term, A. D. 1882, when and where the parties appeared, by their respective attorneys, and the defendant filed the following attested copies of papers on file in said supreme judicial court, namely: 1, writ; 2, petition to remove cause to circuit court; 3, bond for entry; 4, order for removal; 5, declaration; 6, amendment to declaration; 7, answer; 8, amended and supplemental answer; which papers are in the words following, namely:

(1) *Writ.*

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } *ss:*

To the sheriffs of our several counties, or their deputies, Greeting:

We command you to attach the goods or estate of The New York, New England and Western Investment Company, a corporation duly established under the laws of the State of Illinois, to the value of sixty thousand dollars, and summon the said defendant corporation (if it may be found in your precinct) to appear before our justices of our supreme judicial court next to be holden at Boston, within and for our said county of Suffolk, on the second Tuesday of September next, then and there in our said court to answer unto Lucius L. Hubbard, of Cambridge, in the county of Middlesex, in said Commonwealth of Massachusetts, and having place of business at Boston, county of Suffolk, in said Commonwealth, in an action of contract, to the damage of the said plaintiff (as he says) [in] the sum of sixty thousand dollars, which shall t' ... there be made to appear,

with other due damages; and have you there this writ, with
6 your doings therein.

Witness Horace Gray, Esquire, at Boston, the eleventh (11th) day of April, in the year of our Lord one thousand eight hundred and eighty-one (1881).

JOHN NOBLE, *Clerk.*

Officer's Return on Writ.

SUFFOLK, *ss:*

BOSTON, *April* 14, 1881.

By virtue of this writ, of this day, at 30 minutes past one o'clock p. m, attached all the right, title, and interest of the within-named The New York, New England and Western Investment Company has in and to the following-described leasehold estate, being a lease of rooms 7 & 8 in the Howard Bank building, No. 19 Congress street, in said Boston, from the Howard National Bank, of Boston, to said New York, New England and Western Investment Company, dated Jan. 1, 1880, and expires May 1st, 1882. On the same day I attached the goods and chattels described in the schedule annexed and marked "A," as the property of the said defendant corporation, and placed the same in charge of a keeper.

MAY 24, 1881.

I summoned said New York, New England and Western Investment Company to appear and answer at court, as within directed, by delivering to E. H. Jose, Esq., its attorney, a summons,
7 said company not being located in this State and not finding any officer or agent of the same in my precinct, and said Jose accepted service for said company.

JUNE 2ND, 1881.

I removed said attached property, excepting the safe, and stored the same at No. 72 Utica street, in said Boston.

JOHN B. O'BRIEN,
Dep. Sheriff.

Attachment & service & Tr.	$2 58
Keepers & removing	5 00
Storage	20 00
Officer's compensation	10 00
Copy and recording	1 00
Att.	
	$49

(MEMORANDUM.—Schedule "A" is annexed to the officer's return on the writ, but is not here recorded at length. John G. Stetson, clerk U. S. circuit court.)

Copy.

Attest: JOHN NOBLE, *Clerk.*

(2.) *Petition for Removal, etc.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Supreme Judicial Court. Term 1882.

LUCIUS L. HUBBARD
v.
8 THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

Petition for Removal of Said Cause to the Circuit Court of the United States, District of Massachusetts.

To the honorable the justices of the said supreme judicial court:

The petition of the said New York, New England and Western Investment Company, defendant in the above-entitled cause, respectfully represents to this honorable court that it is a corporation duly created and existing under and by virtue of the laws of the State of Illinois, and has its principal office in the city of Chicago, Cook county, Illinois, and a branch office in the city, county, and State of New York; that at the time of the commencement of this suit the said investment company was, since hitherto has been, and still is a citizen of the State of Illinois, and is not nor has ever been a citizen of, nor an inhabitant of, the State of Massachusetts, and that said Lucius L. Hubbard, plaintiff, then was, since hitherto has been, and still is a citizen of the State of Massachusetts, wherein said suit was brought by the said Hubbard and is now pending, and that the amount in dispute in said suit, exclusive of costs, exceeds the
9 sum or value of five hundred dollars; that your petitioner files herewith an affidavit of John W. Deford, its general counsel and attorney and fully authorized to represent it in this behalf, and duly authorized to make said affidavit, stating that he has reason to believe, and does believe, that from prejudice and from local influence said investment company will not be able to obtain justice in this court, the same being a State court.

Your petitioner makes and files herewith a bond in the penal sum of five hundred dollars, with good and sufficient surety, for its entering in the circuit court of the United States for the district of Massachusetts, on the first day of its next session, a copy of the record in said suit, copies of said process against it and of all pleadings, depositions, and testimony and other proceedings in said cause, and also for its there appearing and entering special bail in the cause, if special bail was originally requisite therein, or if required therein, and for paying all costs that may be awarded by said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept this petition and bond and to proceed no further herein except to

10 order the removal of said cause to the circuit court of the United States for the district of Massachusetts.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY,
By JOS. P. HALE, *Pres't.*
JOHN W. DEFORD, *Att'y.*
EDWIN H. JOSE, *Att'y.*

STATE OF NEW YORK, *County of New York,* } *ss:*

I, Joseph P. Hale, being duly sworn, do say that I am the president of the New York, New England and Western Investment Company, defendant above named; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true.

JOS. P. HALE.

Subscribed to by said Joseph P. Hale in my presence and by him sworn to before me this 11th day of September, 1882.

JAMES J. MYERS, [SEAL.]
Notary Public.

Copy.
Attest: JOHN NOBLE, *Clerk.*

11 (3.) *Bond for Entry.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

In the Supreme Judicial Court. Term 1882.

LUCIUS L. HUBBARD
v.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

Know all men by these presents that the said The New York, New England and Western Investment Company, a corporation duly established under the laws of the State of Illinois and located in and a citizen of said State, as principal, and Sylvester Tower, of Cambridge, in the county of Middlesex, in said Commonwealth, as surety, are held and firmly bound unto Lucius L. Hubbard in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said Lucius L. Hubbard, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said The New York, New England and West-
12 ern Investment Company having petitioned the said supreme judicial court of Suffolk county, State of Massachusetts, for the removal of the above-entitled cause from said supreme judicial court to the circuit court of the United States for the district of Massachusetts: Now, if the said petitioner, The New York, New

England and Western Investment Company, shall enter in the said circuit court of the United States, on the first day of its next session, copies of all process against it, and of all pleadings, depositions, testimony, and other proceedings in said cause, and shall there appear and enter special bail in said cause, if special bail was originally requisite therein, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

In testimony whereof the said The New York, New England and Western Investment Company has caused its corporate seal to be hereto affixed, and these presents to be signed and acknowledged by Joseph P. Hale, its president, attested by George W. Debevoise, its secretary, hereto duly and lawfully authorized, and the said Sylvester Tower has hereto set his hand and seal this 11th day of September, A. D. 1882.

[SEAL.] THE NEW YORK, NEW ENGLAND
13 AND WESTERN INVESTMENT COMPANY,
By JOSEPH P. HALE, *President.*
SYLVESTER TOWER. [SEAL.]

Attest: CHARLES PLACE,
Acting Secretary.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Be it remembered that on this 11th day of September, A. D. 1882, before me, James J. Myers, a notary public within and for the county of Suffolk, personally appeared Joseph P. Hale, the president of the New York, New England and Western Investment Company, to me personally known, and known to me to be such officer, who, being by me duly sworn, did depose and say that he resides in New York city, in the State of New York; that he was and is the president of the said company; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corparate seal; that it was affixed thereto by order of the board of directors of said company, and that he signed his name thereto by the like order as president of said company, and that the said Joseph P. Hale, as such president above mentioned, further acknowledged
to me that he had executed the said instrument to be his free
14 and voluntary act and deed, and to be the free and voluntary act and deed of the company aforesaid for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this eleventh day of September, A. D. 1882.

JAMES J. MYERS, [SEAL.]
Notary Public.

STATE OF MASSACHUSETTS, *County of Suffolk:*

SEPT. 11TH, 1882.

I, Sylvester Tower, affiant, of said county, on his oath saith that

he is a resident of the State of Massachusetts and a property holder therein, and is the surety named in the foregoing bond; that he is worth the sum of one thousand dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution; that he has property in the State of Massachusetts, liable to execution, of the value of more than one thousand dollars.

SYLVESTER TOWER.

Subscribed in my presence *by* and by him sworn to before me this 11th day of Sept., A. D. 1882.

[SEAL.] EDWIN A. WADLEIGH,
As 't Clerk of Superior Court.

Copy.
Attest: JOHN NOBLE, *Clerk.*

15 (4.) *Order for Removal.*

Supreme Judicial Court.

SUFFOLK, *ss:*

LUCIUS L. HUBBARD
v.
NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY. } No. 300.

In the matter of the petition of the defendant in said action for the removal of the action to the circuit court of the United States for the first circuit and district of Massachusetts.

It is ordered that the bond and surety on the bond filed in said action by the defendant be accepted, and that the action be removed to the circuit court of the United States for the first circuit and district of Massachusetts, as prayed for in said petition.

Sept. 13, 1882.

W. A. FIELD,
J. S. J. C.

Copy.
Attest: JOHN NOBLE, *Clerk.*

16 (5.) *Declaration.*

SUFFOLK, *ss:*

In the Supreme Judicial Court. September Term, 1881.

LUCIUS L. HUBBARD
v.
NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT CO.

(MEMORANDUM.—A substituted first count having been filed as a portion of paper entitled "Amendment to Declaration" this first count is not here recorded at length. John G. Stetson, clerk.)

Second count. And the plaintiff further says that while the contract set forth in said first count continued in force, and while he

was faithfully performing all acts that were to be done by him under said contract, the defendant, although requested by the plaintiff so to do, failed to give to him, as required by this contract, full information concerning the business transacted thereunder, and more especially failed to give him full information concerning the transaction of the business resulting in the sale of the lands and other property of the Kansas City, Burlington and Santa Fe Railroad Company to the Atchison, Topeka and Santa Fe Railroad Company, as in said first count is more particularly set forth, to the damage of the plaintiff in the sum of $37,436.11, with interest thereon.

17 Third count. And the plaintiff further says that while the contract set forth in said first count continued in force, and while he was faithfully performing all acts that were to be done by him under said contract, the defendant failed to favor said Boston office, so that parties within its precincts might deal directly with said office, but, on the contrary, the defendant endeavored to deal and dealt directly with parties within the precinct of the Boston office or "eastern division," and more especially with the Atchison, Topeka and Santa Fe Railroad Company, its officers and agents, instead of dealing with said railroad company by and through and with the plaintiff, as was practicable, and as was required by the terms of said contract, to the damage of the plaintiff in the sum of $37,436.11 and interest thereon.

Fourth count. And the plaintiff further says that the defendant owes him the sum of thirty-eight thousand five hundred and ninety-eight dollars and sixty-seven cents ($38,598.67), according to the account hereto annexed, marked "C."

LUCIUS L. HUBBARD,
By his attorney, WILLIAM W. VAUGHAN.

18 "C."

Account Annexed.

BOSTON, 11*th April*, 1881.

New York, New England and Western Investment Co. to Lucius L. Hubbard, Dr.

(1.) 1st July, 1880.—To "commissions" or $\frac{1}{3}$ of the gross profit of $117,833.33, earned and received on sale of Kansas City, Burlington and Santa Fe railroad and bonds to Atchison, Topeka and Santa Fe Railroad Co., diminished by ($5,400+$125) viz: $\frac{1}{3}$ (117,833.33 less 5,525) or	$37,436 11
(2.) 11th April, 1881.—Interest on one-third first instalment less $55.25, viz: $\frac{1}{3}$ (74,000 less 5,525) @ 6% from 1st July, 1880, date of demand, to 11th April, 1881, date of writ	1,065 16
(3.) 11th April, 1881.—Interest on one-third last instalment, viz: $\frac{1}{3}$ ($43,833.33) @ 6% from 1st March, 1881, date of demand, to 11th April, 1881, date of writ	97 40
	$38,598 67

19 "B."

Memorandum.

BOSTON, *June 10th*, 1880.

The Atchison, Topeka & Santa Fe Railroad Co. will pay nine thousand (9,000) dollars per mile of main track for the Kansas City, Burlington and Santa Fe railroad, including all depots, rolling-stock, all materials on hand, water-tanks, side-track, turn-tables, machine shops, with tools belonging thereto—in short, all appurtenances of every description belonging to the road.

The Atchison, Topeka and Santa Fe Railroad Company shall have time to examine the title to the property, and, if without unreasonable delay it can acquire a satisfactory title, then by the twenty-fifth of June, 1880, it agrees to pay three hundred and forty-three thousand dollars to the New York, New England and Western Investment Company, at its office in the city of New York, on receipt of five hundred and ninety of the first-mortgage eight per cent. bonds, and a majority, not less than thirty-three hundred and ten shares, of the capital stock of the Kansas City, Burlington and Santa Fe Railroad Company, together with all the bonds and stock issued under the circular dated May fifteenth, 1880, together with a satisfactory conveyance and transfer of the charter and franchises of the Kansas City, Burlington and Southwestern Railroad
20 Company, the total issue of said first-mortgage eight per cent. bonds being six hundred thousand dollars.

The Atchison, Topeka and Santa Fe Railroad Company is to pay seven hundred dollars flat on delivery thereafter for each of the ten bonds not delivered as aforesaid, said bonds to be furnished by January first, 1881, with all c-upons.

The balance of the purchase-money is to be paid, with six per cent. interest from the date of said payment of three hundred and forty-three thousand dollars, when the road has been foreclosed at the instance and expense of the New York, New England and Western Investment Company, and no claim of any kind can be made against the said railroad, tracks, depots, rolling-stock, materials, tanks, turn-tables, shops, tools, and other appurtenances first hereinbefore described in the hands of the purchaser. And in case a good title, free of all liens and claims, cannot be given at the date of said foreclosure, then to pay the said sum as soon as such title can be given under foreclosure, if such title is given within three years of this date; if not all further obligation on the part of the Atchison, Topeka and Santa Fe Railroad Company shall cease and determine.

The Atchison, Topeka & Santa Fe Railroad Company and
21 Mr. Thort are to assist in obtaining the foreclosure. President Schofield and the New York, New England and Western Investment Company agree on the receipt of the first payment to cause the resignation of a majority of the present board of directors of the Kansas City, Burlington & Santa Fe Railroad Company, and to put in their place nominees of the Atchison, Topeka and Santa Fe Railroad Company, and to cause the resignation of

the present board of directors of the Kansas City, Burlington and Southwestern Railroad Company, and to put in their place nominees of the Atchison, Topeka and Santa Fe Railroad Company.

The New York, New England and Western Investment Company will sell said Kansas City, Burlington and Santa Fe railroad, its property, appurtenances, bonds, and stock, and Mr. Schofield agrees to convey the charter and franchises of the Kansas City, Burlington and Southwestern Railroad Company in the manner and on the terms aforesaid.

By order of committee.

T. JEFFERSON COOLIDGE,
President A., T. & S. F. R. R. Co.
WM. H. SCHOFIELD,
President Kansas City, Burlington and Santa Fe Railway Company.
22 J. C. SHORT,
P't N. Y., N. E. & W. Investment Co.

"A."

This memorandum of agreement, made the 17th day of December, A. D. 1879, by and between the New York and New England and Western Investment Company, a corporation duly organized and established under the laws of the State of Illinois, party of the first part, and Lucius L. Hubbard, of Cambridge, Mass., party of the second part, witnesseth:

That for and in consideration of the premises hereinafter contained, by the said party of the first part to be well and truly kept and *and* performed, the said party of the second part hereby agrees to open and take charge [of] a branch office of said corporation at Boston, Mass.; to devote his best energies and time to the interests of said corporation, as far as may not be inconsistent with a due regard for the interests of such legal clients as he may have from time to time, always considering his duties toward said corporation as of the utmost importance; to use his best endeavors to place in New England, where it may be of greatest advantage to said corporation, twenty-five thousand dollars ($25,000) of the capital stock of said party of the first part, and generally to do and perform (within his
23 "division," so called) all legal acts for the furtherance of the interests of said party of the first part as shall be consistent with honor, honesty, equity, and fair dealing.

In consideration of the foregoing promises by the said party of the second part, to be well and truly kept and performed, the said party of the first part hereby agrees forthwith to elect said party of the second part one of its directors, with the title of assistant vice-president; to give said party of the second part the direction of said office designated as the eastern division, subject, of course, to the by-laws of said corporation now in force or hereafter to be enacted; to furnish said office and its furniture, all the books, signs, circulars, and advertising which said corporation may require; to pay the salary of its book-keeper and of such other employés as may be deemed necessary and proper, and generally to pay the running ex-

penses of said office; to pay to said party of the second part the sum of eighteen hundred dollars ($1,800) per year as "salary," together with all expenses of travel incurred by him on its behalf, and a further amount as "commissions," to be determined as follows, to wit: All business originating in said "eastern division," which shall include the whole of Maine, New Hampshire, Vermont, and Massachusetts, or transacted at said Boston office, shall be
24 "valued" according to the amount of gross profit coming therefrom to said corporation, or which can be rightly claimed by it. After deducting from the aggregate of such profits for each year the sum of fifty-four hundred dollars ($5,400), plus the amount of book-keeper's salary, said party of the second part shall be entitled to one-third (⅓) of the balance as commissions, as above. Settlements shall be made between said parties as often as once a month, said party of the second part becoming entitled to said "commissions" *pro rata* as soon as the same shall have been earned and received, and shall exceed, in the aggregate, the amount of $5,400, plus salary of book-keeper, as above set forth, and shall be paid "in kind."

Said party of the first part shall favor as much as practicable said Boston office, to the end that parties within its precincts may deal directly with it. All legal services required by said party of the first part, for itself or others, in suits or proceedings in court, or in the drawing of railroad deeds and mortgages, shall be entitled to extra compensation from said party of the first part.

It is mutually understood that the best interests of the said corporation will be furthered by handling only first-class securities, and that the fullest information shall be furnished said
25 party of the second part from time to time at his request, to the end that he may not be asked or required to place on the market any security which, from its doubtful character, might thereafter reflect on the credit of said party of the first part, or of its officers.

This agreement shall go into effect from and after the sale or purchase by said party of the second part at par of ten thousand dollars ($10,000) of the capital stock of said party of the first part and payment therefor, and shall be in force for one year, at the end of which time there shall be a general accounting together of said parties and a new agreement may be made and entered into if the mutual interests of said parties may so require.

In witness whereof the said parties have hereunto set their hands, said party of the first part by its president thereunto duly authorized, the day and year first above written.

THE NEW YORK, NEW ENGLAND AND
WESTERN INVESTMENT CO.,
By J. C. SHORT, *Pt.*
LUCIUS L. HUBBARD.

Copy.
Attest: JOHN NOBLE, *Clerk.*

26 (6.) *Amendment to Declaration.*

SUFFOLK, *ss:*

In the Supreme Judicial Court.

LUCIUS L. HUBBARD
v.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT CO.

And now comes the plaintiff in said action and moves the court that he be allowed to amend his declaration by substituting for the first count thereof the following substituted first count, and by adding to said declaration the following additional fifth and sixth counts:

Substituted first count:

And the plaintiff says that on or about the seventeenth day of December, A. D. 1879, a contract was entered into by and between the plaintiff and the defendant, a copy whereof is hereto annexed, marked "A," and made a part of this declaration.

That in and by said contract it was, among other things, agreed that the plaintiff should open and take charge of a branch office of said defendant corporation, at Boston, in said county; that he should devote his best energies and time to the interests of said defendant in the manner set forth at length in said contract, and gener-
27 ally should do and perform within the district described in said contract as the eastern division (which included the whole of Maine, New Hampshire, Vermont, and Massachusetts) all legal acts for the furtherance of the interests of said defendant, as in said contract more fully set out; and it was therein agreed, on the part of the defendant, that said defendant should elect the plaintiff one of its directors with the title of assistant vice-president; that it should give him the direction of said Boston office (which was otherwise designated as the eastern division); that it should supply the furniture, books, signs, and circulars needed for said office, and should pay the salaries of the book-keeper and such other employes as might be deemed necessary and proper, and generally should pay the advertising and other running expenses of said office; that it should favor, as much as practicable, said Boston office, to the end that parties within its precincts might deal directly with it, and that it should furnish to the plaintiff at his request the fullest information concerning all business transactions under said contract or in which he was in any way concerned, and that it should pay to the plaintiff (1st) the sum of eighteen hundred dollars a year as salary (together with all expenses of travel incurred by him on its behalf; (2nd) a proper compensation for professional legal services rendered, and (3rd) as commissions one-third of the sum which should re-
28 main after deducting from the gross amount of profits received by the defendant on all business originating in said "eastern division," or transacted at said Boston office, the sum of fifty-four hundred dollars and the salary of the book-keeper, said commission to be payable in kind to the plaintiff so soon as said profit should have been earned and received by the defendant, and as soon as

said profit should exceed the sum of fifty-four hundred dollars and the book-keeper's salary aforesaid. And it was therein further agreed that said contract should go into effect from and after the time when the plaintiff should buy ten thousand dollars of the capital stock of said corporation and pay for the same at the par value thereof, and that said contract should continue in force one year from said time. And the plaintiff says that on or about the twenty-fourth day of December, A. D. 1879, he bought said ten thousand dollars of the capital stock of the defendant and paid for the same at par in cash, and that he was duly elected a director of said defendant corporation, with the title of assistant vice-president thereof, and that he opened a branch office of said company in Boston and took charge of said Boston office or eastern division, and well and faithfully performed all duties to be by him performed under said contract, and that while said contract continued in force, to wit, during or about
29 the months of May and June, A. D. 1880, certain business was carried on and a certain contract was made, a copy whereof is hereunto annexed, marked "B," whereby the Atchison, Topeka and Santa Fe Railroad Company purchased certain property, to wit, the Kansas City, Burlington and Santa Fe railroad, its bonds and stock, with all its property and appurtenances, and the charter and franchise of the Kansas City, Burlington and Southwestern Railway and Telegraph Co., and said purchase was carried into effect by a conveyance and transfer under said contract of said bonds to the Atchison, Topeka and Santa Fe Railroad Company, or to certain persons acting in its behalf, and by a foreclosure of certain mortgages and a transfer of said railroad and other property to certain trustees of the Atchison, Topeka and Santa Fe Railroad Company under an amplification and modification of a part of said contract, made after a partial performance thereof, on the 30th day of June, 1880 (a copy of said amplification and modification being hereto annexed, marked B I), and payment therefor was made, whereby there was earned by the said defendant the sum of one hundred and seventeen thousand eight hundred and thirty-three dollars and thirty-three cents ($117,833.33), gross profits, and that said business originated and was transacted, and said contract was made in said eastern division or Boston office, and that the plaintiff himself
30 procured, or was instrumental in procuring and carrying out, the same, and that prior to the date of this writ, viz., on the first day of July, A. D. 1880, the defendant actually received from the Atchison, Topeka and Santa Fe Railroad Company, or some person acting on its behalf, a portion of the purchase-money for said property, whereof the sum of seventy-four thousand dollars was gross profits, of which the plaintiff became entitled to receive one-third, deducting therefrom $5,400 and $125 (paid for book-keeper's salary as aforesaid)—that is to say, $\frac{1}{3}$ of $68,475, or the sum of twenty-two thousand eight hundred and twenty-five dollars, ($22,825.)

That prior to the date of the writ, to wit, on or about the first day of March, A. D. 1881, the defendant received from the Atchison, Topeka and Santa Fe Railroad Company, or some person acting on

its behalf, the whole or a large portion of the residue of the purchase-money for said property, of which the sum of forty-three thousand eight hundred and thirty-three dollars and thirty-three cents ($43,833.83) was gross profits, and of which the plaintiff became entitled to receive one-third—that is to say, ⅓ of $43,833.33, or the sum of fourteen thousand six hundred *six hundred* and eleven dollars and eleven cents ($14,611.11.)

That on or about the 1st day of July, A. D. 1880, the
31 plaintiff demanded from the defendant the payment of his ⅓ of the gross profits of the first installment received by said defendant, less deductions aforesaid, to wit, the sum of $22,825 in cash or by a credit for the same.

That on or about the first day of March, A. D. 1881, after the second payment of purchase-money to the defendant, the plaintiff demanded from the defendant the payment of his ⅓ of the gross profits thereon received—that is to say, one-third of $43,833.33, or the sum of $14,611.11 in cash or by a credit for the same; but the defendant then and ever since has refused to pay said sums to the plaintiff, to the damage of the plaintiff in the sum of both said amounts—that is to say, $22,825, and $14,611.11, with interest on the first amount from said first day of July, A. D. 1880, and interest on the second from said first day of March, A. D. 1881, according to the schedule hereto annexed and marked "C."

Fifth count. And the plaintiff further says that while the contract between the plaintiff and the defendant set forth in the first count remained in full force, and while the plaintiff was performing all things stipulated by him on his part to be done, certain business was done which was business originating in said eastern division,
whereby the Atchison, Topeka and Santa Fe Railroad Com-
32 pany, either immediately or through a trustee or trustees, purchased certain property, to wit, the Kansas City, Burlington and Santa Fe railroad, its bonds and stock, with all its property and appurtenances, and the charter and franchise of the Kansas City, Burlington and Southwestern railway and telegraph company, and there was earned and received by the defendant as gross profits on said business the sum of $117,833.33, of which according to the terms of said contract the plaintiff is entitled to receive the sum of $37,436.11, *which* interest thereon, as set forth in items (2) and (3) of the schedule hereto annexed, marked "C," viz., the further sums of $1,065.16 and $97.40, making in all the sum of $38,598.67.

Sixth count. And the plaintiff further says that while the contract between the plaintiff and defendant set forth in the first count remained in full force, and while the plaintiff was performing all things stipulated by him on his part to be done, certain business was transacted at said Boston office whereby the Atchison, Topeka and Santa Fe Railroad Company, either immediately or by a trustee or trustees, purchased certain property, to wit, the Kansas City, Burlington and Santa Fe railroad, its bonds & stock, with all its property and appurtenances, and the charter and franchise of the
Kansas City, Burlington and Southwestern Railway and
33 Telegraph Co., and there was earned and received by the

defendant as gross profits on said business the sum of $117.833.33, of which, according to the terms of said contract, the plaintiff is entitled to receive the sum of $37,436.11, and has duly demanded the same.

And the plaintiff says the defendant owes him said sum of $37,436.11, with interest thereon, as set forth in items (2) and (3) of the schedule hereto annexed, marked "C," viz., the further sums of $1,065.16 and 97.40, making in all the sum of $38,598.67.

By his attorney, W. W. VAUGHAN.

B. I.

This agreement, made this thirteenth day of June, in the year one thousand eight hundred and eighty, by and between the Atchison, Topeka and Santa Fe Railroad Company, of the first part, the New York, New England and Western Investment Company, of the second part and Alden Speare, of Newton; Charles S. Tuckerman, of Salem, and Lucien M. Sargent, of Boston, and all in the Commonwealth of Massachusetts, of the third part, witnesseth:

That the said New York, New England and Western Investment Company, in consideration of one dollar and other valuable
34 considerations to it paid by the parties of the third part, the receipt whereof is hereby acknowledged, hereby covenants and agrees with the parties of the third part—

First. That no stock or bonds have been issued under the circular of the New York, New England and Western Investment Company, as financial agent of the Kansas City, Burlington and Santa Fe Railway Company, dated May fifteenth, 1880, and that no rights have been acquired to stock or bonds by subscription pursuant to said circular.

Second. That the total issue of the eight per cent. first-mortgage bonds of the Kansas City, Burlington and Santa Fe Railway Company does not exceed six hundred thousand dollars, and that the capital stock of said last-named company does not exceed fifty-seven hundred [and] twenty-five shares of one hundred dollars each.

Third. That said investment company will forthwith procure at its own expense the foreclosure of all the mortgages on the property of the Kansas City, Burlington and Santa Fe Railway Company, except the mortgage for eleven million dollars, dated January first, A. D. 1880, for the benefit of the bondholders and of the parties of the third part and their assigns, and further will procure and cause to be conveyed to said parties of the third part, or their sur-
35 vivors or survivor or assigns, within three years from this date, a good title, free from all claims, liens, and incumbrances, to the railroad already constructed of the Kansas City, Burlington and Santa Fe Railway Company, commencing at or near the city of Ottawa, in Franklin county, Kansas, and running thence via Williamsburg to the city of Burlington, in Coffey county, including all branches and tracks, side tracks and depot grounds, all depots, station-houses, engine-houses, car-houses, freight-houses, grain, wood and coal houses, machine shops, or other buildings, water tanks,

turn-tables, offices; also all the real estate, rights of way, rolling-stock, materials now on hand, tools, chattels, rights, titles, franchises, and interests of the said Kansas City, Burlington and Santa Fe Railway Company, including all the rights, titles, franchises, property, and interests of the said railway company, in the entire road constructed or being constructed between Kansas City and Santa Fe.

And it is further agreed that all and singular the said first-mortgage bonds transferred to said parties of the third part shall by them or their assigns, on request in writing of said investment company, be delivered or caused to be delivered to the officer who may sell said railroad or other property or any part thereof under any
36 decree of foreclosure or judgment obtained by said investment company, its authorized agents or attorneys, in performance of this the third article of this agreement; said bonds to be so delivered to said officers in payment in behalf of the parties of the third part for said railroad and other property which may be so sold at such judicial sale pursuant to this article; but said investment company shall pay all costs, attorney's fees, or other cash payments necessary in making such foreclosure or taking other proceedings in execution of this article; and like use may be made of the notes transferred to the parties of the third part in the foreclosure of the real and chattel mortgages assigned to them, and in payment, in their behalf, for the chattels and real estate sold under such foreclosure.

Fourth. That it will procure a satisfactory conveyance and transfer to said parties of the third part, on or before the first day of September, 1880, of the charter and franchises of the Kansas City, Burlington and Southwestern Railway and Telegraph Company, and will likewise procure, on or before said date, the resignation of a majority of the directors of said last-named company and the election in their stead of persons to be nominated by the parties of the third part.

The said Atchison, Topeka and Santa Fe Railroad Com-
37 pany and said parties of the third part agree that they will promote said foreclosure, and that the bonds held by the parties of the third part may be used in said foreclosure and in the purchase of said road at any foreclosure sale; and said Atchison, Topeka and Santa Fe Railroad Company agrees that whenever the title to said railroad and other property hereinbefore agreed to be conveyed shall be vested in said parties of the third part, their survivors or survivor or assigns, free of all liens and claims whatsoever as aforesaid, it will pay to said New York, New England and Western Investment Company the sum of thirty-eight thousand and six hundred dollars, with interest thereon at the rate of six per per cent. per annum, from the twenty-fifth day of June, in the year 1880; and if, on measurement of the main track of said Kansas City, Burlington and Santa Fe Railroad Company, it should be found to exceed in length forty-two and four-tenths miles, said Atchison, Topeka and Santa Fe Railroad Company agrees to pay a further sum, in addition to said sum of thirty-eight thousand six hundred dollars, equal to nine thousand dollars per mile for each

mile or part of a mile of such excess, on the vesting of said title aforesaid:

Provided, however, That if, from any cause whatsoever,
38 said title shall not be vested in said parties of the third part, or their survivors or survivor or assigns, free from all liens and claims within three years from this date, all liability on the part of the Atchison, Topeka and Santa Fe Railroad Company to pay said sum of thirty-eight thousand and six hundred dollars, and any sum in addition to the same, or any part thereof, shall cease and determine.

The said parties of the third part further agree to pay to said New York, New England and Western Investment Company, on or before the first day of January, 1881, on delivering to said parties of the third part *of* the remaining eight per cent. first-mortgage bonds of the Kansas City, Burlington and Santa Fe Railway Company not this day transferred to them, seven hundred dollars flat for each of said bonds as they shall severally be delivered, and said New York, New England and Western Investment Company agree to deliver said bonds to said parties of the third part on or before said date.

In witness whereof the parties of the first and second parts have caused their corporate names to be hereto subscribed and their seals to be affixed, by their respective officers thereunto duly authorized, and the parties of the third part have hereto set their hands and seals the day and year first above written.

39 (S'g'd) THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT CO.,
By J. C. SHORT, *Pt.*
(Signed) ALDEN SPEARE.
(Signed) THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,
By S. LOTHROP THORNDIKE, [SEAL.]
Comptroller.

Copy.
Attest: JOHN NOBLE, *Clerk.*

(7.) *Defendant's Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

In Supreme Judicial Court. Sept. Term, 1881.

LUCIUS L. HUBBARD
v.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

And now comes the defendant in the above-entitled action and denies each and — allegation in the plaintiff's writ and declaration and each and every item, count, balance, charge, and claim in the said declaration set forth, and says it owes the plaintiff nothing.

40 And the defendant, further answering, says that if any such memorandum was made between the defendant and the Atchison, Topeka and Santa Railroad Company, as alleged and set forth in plaintiff's declaration, the same never became operative and was entirely superseded, and that no money was ever earned thereunder, as alleged.

And the defendant, further answering, says that if ever any contract was made and any money earned on account of the sale of any bonds and other property of said Kansas City, Burlington and Santa Fe Railroad Company, neither was the said contract made nor did the business originate in, nor was it transacted in, the Boston office, as alleged, and that nothing ever became due the plaintiff on account thereof.

And the defendant, further answering, says that it never failed to give the plaintiff all the information required or called for by the plaintiff in all transactions in which he was interested and all the information which its contract with the plaintiffs called for, and, therefore, it owes the plaintiff nothing.

And the defendant, further answering, says it always favored the Boston office as far as practicable, and, therefore, it owes the plaintiff nothing.

41 And the defendant, further answering, says that the plaintiff, by his words and acts previous to the bringing of this suit, is estopped from claiming the sums alleged in his declaration as due him from the defendant, and, by reason of said words and acts, is not entitled to receive from the defendant the sum alleged, nor any part thereof.

NEW YORK, NEW ENGLAND AND
WESTERN INVESTMENT CO.,
By EDWIN H. JOSE, *Their Attorney.*

Copy.
Attest: JOHN NOBLE, *Clerk.*

(8.) *Amended and Supplemental Answer.*

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
Suffolk, }

In Supreme Judicial Court.

LUCIUS L. HUBBARD
vs.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

First count. And now comes the defendant in the above-entitled action and denies each and every allegation in the plaintiff's writ and declaration, and each and every item, count, balance, sum, charge, claim, number, and quantity in said declaration and
42 account annexed set forth, and says it owes the plaintiff nothing.

Second count. And the defendant, further answering, says

that it never sold the bonds and property of the Kansas City, Burlington and Santa Fe Railroad Company to the Atchison, Topeka and Santa Fe Railroad Company, as alleged, and, further answering, says that if ever any such memorandum was made, as alleged and set forth in plaintiff's declaration, no money was ever earned or paid thereunder, as alleged, but the said memorandum was entirely merged in and superseded by a formal contract between the Atchison, Topeka and Santa Fe Railroad Company, the New York, New England and Western Investment Company, and Alden Speare, Charles S. Tuckerman, and Lucius M. Sargent, which said contract was dated June 30th, 1880, a copy whereof is hereto annexed, marked "A."

And the defendant, further answering, says that it never made any such contract with the plaintiff as alleged, and, further answering, says that John C. Short, the person whose signature appears to have been affixed to the instrument, a copy of which is annexed to the plaintiff's declaration and marked "A," was not the president of the defendant corporation at the time said instrument was dated, and that he, said Short, had no authority to make the same, and
43 never had, and that his said acts were never ratified by the defendant, and says it owes the plaintiff nothing.

Third count. And the defendant, further answering the plaintiff's second count, says that it never failed to give the plaintiff all the information required or called for by the plaintiff in all transactions in which he was interested, and, therefore, it owes the plaintiff nothing, and is not liable for any [of] the damages alleged by the plaintiff.

Fourth count. And the defendant, further answering the plaintiff's third count, says that if it was ever obliged, by virtue of any contract with the plaintiff, to favor the Boston office as far as practicable, it did favor the Boston office as far as practicable in all matters in which the plaintiff was interested, and that the plaintiff was not interested in the transaction complained of, and that in the transaction complained of it was not practicable to favor the Boston office, and denies that it is liable for any — the damages alleged by the plaintiff.

Fifth count. And the defendant, further answering the plaintiff's fifth count, says that the business complained of, to wit, the alleged purchase by the Atchison, Topeka and Santa Fe Railroad Company, either immediately or through a trustee or trustees, of certain property, to wit, the Kansas City, Burlington and Santa Fe railroad, its bonds and stock, with all its property and appurtenances,
44 and the charter and franchise of the Kansas City, Burlington and Southwestern Railway and Telegraph Company, did not originate in said eastern division mentioned in said instrument declared, nor any part thereof, and that the plaintiff is not entitled to receive any portion of the proceeds or profits of any — the sales alleged.

Sixth count. And the defendant, further answering the sixth count in the plaintiff's said declaration, says that the business therein referred to and complained of, to wit, the purchase by the Atchison, Topeka and Santa Fe Railroad Company, either immediately or by a

trustee or trustees, of certain property; to wit, the Kansas City, Burlington and Santa Fe railroad, its bonds and stocks, with all its property and appurtenances, and the charter and franchise of the Kansas City, Burlington and Southwestern Railway and Telegraph Company, was not transacted at the Boston office, as alleged, and that the plaintiff is not entitled to receive any portion of the proceeds or profits of any [of] the business alleged; and the defendant says it does not owe the plaintiff the said sums alleged nor any part thereof nor interest thereon.

(MEMORANDUM.—A substituted seventh count was filed in [the] circuit court November 8th, 1882, as a portion of a paper en-
45 titled "Amendment to Answer," this seventh count is not here recorded at length. John G. Stetson, clerk.)

Eighth count. And the defendant, further answering, says that the plaintiff, if he was ever entitled to any [of] the sums alleged by his words, acts, and statements at meetings of the directors of the defendant corporation, held in the months of July and August, A. D. 1880, at the defendant's office in the city of New York, previous to the bringing this suit, is estopped from claiming the sums alleged in his declaration as due him from the defendant, and by reason of said words, acts, and statements is not entitled to receive from the defendant the sums alleged nor any part thereof.

NEW YORK, NEW ENGLAND AND
WESTERN INVESTMENT COMPANY,
By its attorney, EDWIN H. JOSE.

(MEMORADUM.—Here is attached a copy of agreement made the thirtieth day of June, 1880, between the Atchison, Topeka and Santa Fe Railroad Company, the New York, New England and Western Investment Company, and Alden Speare, of Newton; Charles S. Tuckerman, of Salem, and Lucius M. Sargent, of Boston. A copy of which said agreement having been attached to plaintiff's amended declaration, and marked "B I," it is not here recorded at length. John G. Stetson, clerk.)

46 On the eighth day of November, A. D. 1882, the following amendment to answer was filed in this circuit court:

Amendment to Answer.

The defendant's answer may be and is amended by striking out from the second count the words "said plaintiff's first count" and by substituting the following for the seventh count of said answer:

"And the defendant, further answering, says that the plaintiff agreed with the defendant that if he should be elected assistant vice-president in 1880 he would, in consideration thereof, waive and relinquish all claim against the defendant in respect of the alleged transactions set forth in his declaration, and thereupon, and in consideration thereof, the plaintiff was elected assistant vice-president as

aforesaid, and accepted said election in full accord and satisfaction of said claim, and released and discharged the defendant therefrom."

(Signed) W. A. MONROE,
(Signed) JNO. W. DEFORD,
Att'ys for Def't.

Issue thus having been joined, the cause, after a full hearing, the Honorable Thomas L. Nelson, district judge, sitting, is committed to a jury sworn according to law to try the issue, who,
47 after hearing all matters and things concerning the same, return their verdict therein, and upon oath say: "The jury find for the defendant."

It is thereupon, to wit, May 14, 1883, considered by the court that the said Lucius L. Hubbard, plaintiff, take nothing by his said writ, and that the said New York, New England and Western Investment Company, defendant, recover of the said plaintiff its costs of suit taxed at ——

Upon the trial of said cause, after the evidence was closed on both sides, and before the issue was submitted to the jury, the said plaintiff filed his bill of exceptions, which was duly allowed by the Honorable Thomas L. Nelson, district judge, and is in the words and figures following:

Plaintiff's Bill of Exceptions.

UNITED STATES OF AMERICA, *ss:*

Circuit Court of the United States, — Massachusetts District.

LUCIUS L. HUBBARD
v.
THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

48 Be it remembered that at a term of the circuit court of the United States, holden at Boston, within and for the district of Massachusetts, on the sixteenth day of October, A. D. 1882 (the fifteenth day being Sunday), by the Honorable Thomas L. Nelson, district judge of the district aforesaid, then and there holding the circuit court for said district, came Lucius L. Hubbard, and by an action of contract begun originally in the supreme judicial court of the Commonwealth of Massachusetts in and for the county of Suffolk, and removed thence to the circuit court of the United States by the defendant therein, declared against the said New York, New England and Western Investment Company, as by the writ and declaration and amended and substituted declaration will of record appear, to which the defendant filed their answers and amended answers, as also of record appears, and thereupon said cause came on for trial before said circuit court at said October term before a jury empanneled for the purpose, and that it then and there appeared in evidence that the plaintiff was a lawyer practicing in the city of Boston. The

defendant was a corporation duly chartered and organized under the laws of the State of Illinois. A copy of its charter is annexed.

It appeared in evidence from the records of the defendant
49 company that at a stockholders' meeting duly called and held in Chicago on the 10th day of August, 1878, it was voted that the location of the company and chief place of business be fixed at Chicago, Illinois, and that branch offices may be opened in New York, Boston, and Philadelphia. In pursuance of this authority, the president, John C. Short, proceeded to open an office of the company in New York city. At a directors' meeting held in pursuance of due notice in Chicago on the first day of March, 1879, the president, John C. Short, as appears by said records, reported the opening of a branch office in New York, and this action was approved. This New York office became and was at the time of the transactions here in question the main business office of the company, at which its business was chiefly transacted, the home office being in Chicago. It was voted at said directors' meeting that the president be authorized to establish branch offices in the cities of Philadelphia and Boston and at such other places as, in his discretion, are necessary for the interests of the company, at such times as, in his discretion, shall seem desirable. In October, 1878, the president of the defendant company presented a letter of introduction to the plaintiff.

As to the interview which then took place, the plaintiff testified:

"Mr. Short told me that he was at the head of a company
50 which had recently moved from Chicago to New York; told me that it was an investment Co., which proposed to place farm loans and other loans to refund the debts of municipal and other corporations, to reorganize corporations, such as railroads or otherwise, and to do a general investment business. He said that the advantages of a company of that kind were very great, because oftentimes people who had no time or perhaps no means of informing themselves as to the security of certain investments might, if they had a company of integrity and ability to go to and ask questions and get advice about securities, be very apt to bring in a very large business to such company, and he said that the general principle upon which his company acted was to divide the commissions which they might receive on any business into three parts; one part went into the company's treasury to pay for the incidental expenses and for the commiisions and for a per cent. to the company; the second part went to the person at the West, in case of farm mortgages or other securities procured there, as commissions for doing the business at that end; the third part would go to such parties as might bring customers to the company at this end—the Eastern end.

He said that by so doing, by dividing up their commissions
51 into three parts, while they themselves or the company would have its net commissions reduced considerably, they would encourage people by offering this liberal commission to make business for the company, to bring it into the company, and he thought that in the end the earnings of the company would be very much more considerable under that policy than if the company sought to

retain a larger share of the commissions for themselves. He asked me if I could bring any business to the company among my Boston acquaintances and friends, and said that they thought of opening a branch office here, and that he was trying to get a Mr. Loring, formerly cashier of the Metropolitan Bank, to take charge of the office, but that he wanted to get as many persons as possible interested in the company to bring business to the Boston office, and those persons would be entitled to one-third of the commissions obtained by the company — any such business which might be brought in. He also said that there would be from time to time more or less legal business to be attended to for the company in Boston, and I told him that that part of the business I should be very glad, indeed, to secure, if possible, and I would also bring in any other business that I could at the same time.

52 Q. And if you brought in other business, what were you to receive?

A. If I was to bring in other business I was to receive one-third of the gross commissions obtained by the company.

Q. (By Mr. MONROE): What was the date of this conversation?

A. This was in October or November, 1878.

Q. (By Mr. VAUGHAN): Then, if I understand it correctly, their gross profits were divided into three parts, one-third to go into the treasury to pay expenses and make the net profits out of which the dividends were to be paid, another third, in the case of farm mortgages and such things, was to go to the people out West, and the other third, which you are claiming, was to be given to the parties bringing business to the company?

A. That is as I have stated it.

Q. Go on and state if you had any other conversations with Mr. Short in reference to bringing business or commissions to the company.

A. I had two or three interviews and conversations with Mr. Short during his visits to Boston. Just exactly what was said at each conversation I do not now recollect. My memory is merged in general talk which passed during our interview and during our correspondence.

Q. I want to know whether at any of these conversations the proposition to give one-third of the gross commissions was ever changed or modified?

53 A. No modification of the offer was ever made until the company offered me the direction and control of the Boston office.

On the cross-examination he testified:

Q. Now, Mr. Hubbard, you have testified here to the effect that there was some sort of an arrangement between you and Mr. Short, as president of the defendant company, during 1878–'9, as to the business?

A. Yes, sir.

Q. You say there was no contract, prior to Dec. 17, 1879, of any kind, whereby you claimed to be entitled to recover for services de-

scribed in your declaration here, but you had been led to understand that certain compensation would be paid you. What had you been led to understand on that subject?

A. Mr. Short, in his conversation with me, and possibly by letter—about the letters I cannot state fully, because some of them have been lost—but I can state definately from recollection as to several conversations which we had in my office in Boston. He did not make any agreement, in the strict sense of the term, but he was negociating. He told me the general scope of the business,
54 as I testified in direct examination, how they divided their commissions on the business, and what business they expected would come in; and, while I should retain my business as practicing attorney, he wanted me to bring business into the company, financial business, such as it could attend to, and stated that in cases where I did bring such business I would be entitled to one-third of the commissions obtained by the company for transacting the business.

Q. Did you say that that you agreed to bring in business?

A. I did say that I would distribute the circulars of the company and try to get business for them. I think one of my letters read this morning refers to that very thing, because I remember distinctly that Mr. Short did send me various circulars two or three different kinds, one stating the general business of the company and another one stating more particularly with reference to the railroad business of the company, and another more particularly with reference to mortgage loans at the West. These circulars were sent to me, and I distributed a number of them by mail and otherwise among parties whom I thought I might get to bring business to the company through me.

55 Negociations were pending for nearly a year between the plaintiff and Mr. Short, defendant's president, who acted in behalf of the company, the plaintiff objecting to several propositions which were made for his services as manager for the company of the Boston office, the first being made in March or April, 1879. During all this time, however, the president, Mr. Short, desired him to bring to the company any business that he could procure for third parties, and offered to give the plaintiff one-third commission on such business.

The following letters were put in evidence:

NEW YORK, *Nov. 19th*, 1878.

Lucius L. Hubbard, Esq., att., &c., 61 Court street, Boston.

VERY DEAR SIR: Your favor — 9th inst. was duly received, and would have been promptly answered but for the arrival of my family from the West and the time necessarily required of me in getting into our house and putting things in order. I hope the delay may have caused you no inconvenience.

Replying, I beg to say you will be entitled to commissions on all business done by us for each person or corporation for whom
56 we shall make investments and whom you may bring to us, whether on first or subsequent dealings.

2nd. Our company can give no security for the proper application of money, bonds, &c., other than this: The proper introduction to (for instance, yourself, in the event you shall conclude to become an agent for the company) and the full paid capital of the company. These are all the guaranties we could give beyond our pledge of scrupulous fidelity.

Oour corporation, to be sure, is not a creature of your State, but it is acces-ible, of course, by proceedings in U. S. courts quite as readily as though it were a local corporation. In case you should take hold for us with energy and — both time and influence to our business we will constitute you one of the attorneys of the corporation for Boston, and bring the legal business to you in all cases originating in your agency relation, so far as we may be in position to do so, giving you the preference wherever and whenever we can properly do so. I shall be pleased to hear from you, and learn whether I have satisfactorily answered your questions, and what your present views are concerning the subject. I am pleased to report excellent progress here in forming alliances and opening avenues to large money.

Very truly, J. C. SHORT, *Pt.*

57 No. 61 COURT STREET,
BOSTON, *May 13th*, 1879.

John C. Short, Esq., pres't, &c., New York.

DEAR SIR: I beg leave to report progress. I have had a long talk with a personal friend, a holder of much trust property, and one of our registers in bankruptcy, who has promised to aid me in placing stock where it will make good returns, and says he thinks I will have no difficulty in disposing of the $25,000 allotted to Boston. He goes West for ten days next Friday, and I shall have to pause somewhat until his return. As soon as I can see my way clear to selling $10,000 of stock I shall make a proposition which I think you will consider fair, although it may appear to be made, as Mr. Kirk once remarked to you, "with an eye to the main chance."

The only obstacle which is likely to meet me in this affair is that I know so little of the men who comprise your board of directors. People ask who is Mr. Short? Who is Mr. Watson? Who is Mr. Debevoise? What has been their business in former years? The
58 success of your company depends largely on the characters of the men who manage it and upon their ability as business men. Anything in their past connections which may be open to criticism will be apt to act as a cold blanket on would-be investors. I speak thus openly that you may, if you see fit, give me a little resumé of the past business connection of each of your board, and I can then be more ready to answer questions.

If I undertake the agency I shall exert every endeavor to make myself valuable to you; and, if it is proper to foreshadow my proposition, I may say that I now think more favorably of the commission than of the salary, for I shall then be more independent. But more anon. Believe me, very sincerely, yours.

LUCIUS L. HUBBARD.

New York, New England and Western Investment Company. (Incorporated.) Capital stock, $200,000. 31 & 33 Pine street.

NEW YORK, *Oct.* 3*rd*, 1879.

L. L. Hubbard, Esq., Mt. Rineo House, Moosehead Lake, Me.

MY DEAR SIR: Your favor 30th ult. is before me; contents noted.

59 Referring to your conclusion in relation to the placing of $25,000 of our stock in Boston, in advance of our opening or establishing business there, and both accepting and regretting your conclusion, both on personal and financial grounds, I write to say that it is my present purpose to go to Boston during the month and open an office in person, first finding a suitable man to take temporary charge of it in my absence, and that I would be very glad to have yourself and friend, the register in bankruptcy, take $5,000 each of our stock, under satisfactory arrangements, to be made with yourself, and for the management of the Boston office. We will then take our time to form further alliances.

I am far from urging an arrangement with you, but, having taken stock in you personally, I hope by the contemplated arrangement to promote your worldly prosperity. My highest anticipations in relation to our company's success have been more than realized, and our Mr. Debevoise is averse to any further sales of stock, preferring to keep the remainder in the treasury and distribute it later as a stock dividend.

I shall probably make my preliminary trip to Boston before you return, but in the meantime I will be obliged for a note from you in reply to this—at your pleasure.

Hope you may have a profitable vacation.

Very truly, J. C. SHORT, *Pt.*

60 BOSTON, *Oct.* 29, 1879.

J. C. Short, Esq., pres't, &c.

MY DEAR SIR: Your kind favor of the 3rd inst. did not reach me until last Sunday night on my return.

I reached Boston yesterday, and hasten to reply to your suggestions. In the first place, as I am always frank, I need light on this point. Why do the company's officers (or one of them) wish to keep all the remaining stock in the treasury because it is so valuable and at the same time exact as a condition precedent that their Boston agent shall first buy or place ten thousand dollars' worth of the same stock before he shall be duly commissioned? I cannot exactly see the bearing of this condition. As to taking temporary charge of your office here, you can re-dily understand that I would not care to break up my present surroundings to find myself afloat again in perhaps a few months, nor would I care to take up a new business and lay it down again almost immediately. I had made up my mind if I went into the business to make it succeed, and I would not care to work hard only to have my successor reap the fruit of my labor. As to

the stock, I had thought of investing in it personally
61 from $1,500 [to] $2,000, and perhaps more from time to time as I felt able, but on the other point I feel quite firm. I cannot afford to place myself under obligations to friends by asking them to help me into an office of profit, especially where some unforeseen occurrence might cause a total loss to them of their investment. Under these circumstances the proposition that would seem reasonable to me is: Appoint your agent for a year or during good behavior, with a salary, say, of $1,800; open your office here, and let him form alliances slowly and carefully without having to place himself under obligations to do so. If you think him a success at the end of the year, well and good; if not, get him a successor. Under such circumstances I think I could answer your purpose. When you come to Boston I shall be glad to talk over the matter with you.

Very sincerely, L. L. HUBBARD.

NEW YORK, *Nov. 11th*, 1879.

L. L. Hubbard, Esq., Boston.

MY DEAR SIR: Your esteemed favor — 29 ult. was duly received, and would have been replied to at once had it required such attention; but I am so pressed for time I cannot nearly keep up my correspondence.

62 Replying to your question, "Why do the company's officers (or one of them) wish to keep all the remaining stock in the treasury, and at the same time exact, as a condition precedent, that their Boston agent shall first buy or place," &c., I have to say that I have deemed it desirable to have alliances formed by that method on the assumption that the influence so obtained would be worth at least as much as the loss of income to us caused by parting with the stock. But recent business we have secured is of so great value to us that we cannot now afford to part with the stock at all. This, together with the very great increase in our general business within the past three months, has compelled us to change our entire programme. The success of our company is a great source of pleasure to me, since it surpasses all I have ever claimed it would reach.

For personal reasons I very much regret that you did not fully appreciate the opportunity, and get your "oar in" before you went to the woods, because I had hoped to have you our "managing director" for Boston, &c. Some three weeks ago we sent for our Mr. Watson, sec'y and treas'r, Chicago, to come to New York for a month or two to assist us, my purpose being to run over to Boston as soon as he came and see you. I've not yet seen the day I could
63 do it, even with his assistance, but I will be over before long and go over the matter with you.

Sincerely, yours,

(Signed) J. C. SHORT, *Pt.*

BOSTON, *Nov. 12th*, 1879.

J. C. Short, Esq., pres., &c., 33 Pine street.

MY DEAR SIR: Your favor of the 11th inst. has just come to hand, and I regret that you misconstrued my position on the flattering

offer made me by your company. I have always since my interviews with you in N. Y. had implicit personal faith in the success of your enterprise, and it was with very great regret that I came to the conclusion finally communicated to you. It was a conclusion arrived at solely because of my unwillingness to place myself under obligations to friends and others. I supposed the reason you give for forming alliances in Boston to be the one which led to your desire to place stock here, but did not think that end could so well be reached by placing so much of it in the hands of only two men.

I have been asked lately by several wealthy gentlemen how this affair was progressing, and they seem to think the business must succeed if carefully conducted. I still think that when the
64 company is once established here these people would be glad to help it, should I be connected with it, if for no other reason than on my account, but I do not feel like asking their favors in advance.

I shall be glad to see you at any time, and remain,

Very sincerely, LUCIUS L. HUBBARD.

Up to December, 1879, the plaintiff had declined all propositions made to him to take the Boston office. Finally, December 17th, 1879, an interview was held between the plaintiff and the defendant officers, in New York, at the office of the defendant, at which interview were present the plaintiff, John C. Short, the president of the defendant company; William P. Watson, its secretary and treasurer, and George W. Devoice, its vice-president. These three gentlemen were also three of the five directors of the company.

As to this interview the plaintiff testified as follows:

(By Mr. VAUGHAN:)

Q. I want to ask you one or two more questions with reference to the time when you made the contract with the def't in New York, which you testified was on the 17th day of December, 1879,
65 the day on which the contract was dated. With whom at the time of making that contract did you have a talk?

A. You mean just before the contract was made?

Q. Just before—that is, who were present at the time of the consultation which resulted in the making of that contract?

A. Mr. Short, Mr. Watson, and Mr. Debevoice were all sitting around the table.

Q. What was the conversation, as far as you can tell?

A. The conversation—I might go back, perhaps, an hour or so before this conversation when I called at the company's office, and there met Mr. Debevoice for the first time; was introduced to him by Mr. Short, and I met Mr. Watson, I think, for the first time also. Mr. Short told me a good deal about the prospective business of the company, and also what it had already done, and asked me if I were ready to make some agreement with them to take charge of the Boston office if they should open one.

Q. At this time Mr. Short and Mr. Debevoice were present?

A. Mr. Short, Mr. Watson, and Mr. Debevoice were present; and

Mr. Short asked me if I would make a memorandum of the terms upon which I would agree to take charge of the company's office in Boston. At that time the company had no office in Boston.
66 It had rented one for one or two months and then gave it up.
I made such a memorandum, and after making it the conversation to which I just referred took place around the table in the company's back office, in which Mr. Short, Mr. Debevoice, and Mr. Watson were all present. I stated the terms of agreement substantially as they were embodied in the agreement which was afterwards signed. We talked them all over, point by point, discussed them, and some slight modifications, perhaps, were made from the terms as I had originally written them in the memorandum. Then Mr. Short requested me to put those terms in writing in the form of a contract, which I did in Mr. Short's little office, and after writing it I brought it out and showed it to Mr. Short and he made a few suggestions in pencil, interlineations, which I then made in ink, as the contract will show.

Q. Do those alterations show on the original contract?

A. The alterations show on the original contract.

Q. That is the paper which you wrote immediately after talking with Messrs. Short, Debevoice, and Watson?

A. Yes, sir.

Q. Were there any changes made after you wrote it except those which are noted there in ink?

A. No, sir; those changes were made in pencil by Mr.
67 Short and copied in ink by myself. After I had written out the contract Mr. Short, Mr. Watson, and Mr. Debevoice all retired to the little room.

Q. With the paper or without?

A. I don't remember whether they had the paper or not. After they came out Mr. Short signed the contract, and after he signed it I did.

Q. How long were they gone in the other room?

A. Oh, they were gone 10 or 15 minutes, and after signing the contract Mr. Short wrote the letter which has been put in evidence, of the same date, and handed it to me, with the contract.

Q. As you have already testified?

A. As I have already testified.

Q. Have you the paper memorandum which you say was drawn up, and which you say was the basis of the contract?

A. No, I have not; I destroyed it at the time.

Q. State whether or not that memorandum contained the same terms as those in the contract.

A. That memorandum contained substantially the same terms.

Q. That memorandum with the verbal alterations contained the same terms that you afterwards put in writing on this paper, and was what you discussed with them, I suppose?

A. Yes, sir.

Q. You started with the memorandum and discussed it with Messrs. Short, Debevoice, and Watson?

68 A. Yes, sir.

Q. Did the paper memorandum, with the alterations made at that time, embrace the terms of this contract?

A. Yes, sir; just the same exactly.

Q. Whether or not there are any terms in this contract which were not discussed by you, before you put it in writing, with Messrs. Short, Debevoise, and Watson?

A. No, sir; to the best of my belief, there are not.

Q. You don't know whether or not they took the contract with them into the other room?

A. I don't recollect; my impression is they did, but I couldn't be certain; I have nothing to fix it in my memory that they absolutely did take the contract.

On cross-examination he testified *he testified* as follows:

He showed me — balance sheet of the business of the last 3 or 4 months.

Q. Did you discuss the terms of this contract?

A. We did not discuss the terms of the contract then, because Mr. Short asked me whether I had come to any decision as to on what terms I would take the charge of the Boston office, and then he asked me if I had reduced them to writing. I told him I had not come to any conclusion, but, if he desired, I would state some terms to
69 him then, and that I would make a memorandum of the terms upon which I would be willing to take charge of the Boston office; that I was pleased to see that they expected to make an alliance with the Farmers' Loan and Trust Co., or rather with prominent gentlemen in that company, of whom Mr. Wm. B. Astor was one. He told me that they expected to sell $28,000 worth of stock at par—$14,000 to Mr. Astor and $14,000 to Mr. Tallman—who he said was worth $4,000,000, and considering that a very good alliance, I told him that I would state the terms to him, and I withdrew by myself to think over the matter.

Q. Where did you go?

A. I withdrew into the back office; and after thinking the matter over I formulated a series of conditions on a scrap of paper, and after I had finished reported to Mr. Short that I was ready to talk the matter over, and he, Mr. Debevoise, and Mr. Watson all came into the back office, and we sat around a large table there and discussed the items one by one.

Q. Where is that memorandum?

A. That memorandum I destroyed at the time, after I had drawn up the contract in suit.

70 Q. Do you say that that contained all the material stipulations set forth in this contract of Dec. 17th?

A. Yes, sir.

Q. And that Mr. Debevoise and Mr. Watson were there and heard them stated?

A. Mr. Debevoise, Mr. Watson, and Mr. Short were all there, seated around the table, at the time I read it.

Q. Do you say they all assented to it?

A. They all seemed to assent, as far as I could judge. I did not hear any word of dissent.

Q. What next took place after the discussion?

A. Then Mr. Short, in the presence of the others, asked me to reduce the terms into the form of a regular contract, and gave me some paper, and I retired to his little private office and complied with his request, reducing the terms of the memorandum to the words which are now in the contract.

Q. In your handwriting?

A. Yes, sir.

Q. Is that the only original you made?

A. Yes, sir; that was the only original. It was so late that I had not time to make another one, and a letter-press copy of that was made and given to me.

Q. After you brought out that contract, was it read over or
71 examined by those other gentlemen, Mr. Debevoise, Mr. Short, and Mr. Watson?

A. My impression is that after I drew the contract up, and before it was signed, Mr. Short, Mr. Debevoise, and Mr. Watson took it into the private office where I had written it; I say "my impression is," because I am not sure whether they retired with the contract or without it; but they all did retire to this room while I was waiting for the contract, and they came out after about 15 minutes, I should think, and Mr. Short signed the contract and I signed it. Watson was present when Short signed it, and, I think, Debevoise, and then Mr. Short put it away in the safe.

On the day the contract was signed the following letter was written:

NEW YORK, *December 17th*, 1879.

L. L. HUBBARD, Esq., present:

DEAR SIR: Referring to our conversation in relation to your becoming a stockholder and director in our company, in representing us in Boston, and of certain matters of previous understanding in relation to the stock of our company, and to the contract we hold for financing the Brooklyn Elevated and Atlantic Beach Rail-
road Company, I write to confirm the same, as follows:
72 About $112,000 of the stock now outstanding represents the cost of the charter of the company, and the good will, contracts, business, and interests of J. C. Short, William P. Watson, and George W. Debevoise, turned in or transferred to the company.

All the unissued stock is in the treasury of the company and is to be sold at not less than par, for cash, for the treasury of the company.

It is understood that on the successful carrying out of the arrangements of the above-named railroad Co. the investment company is to receive out of the first-mortgage bonds $200,000, and out of the stock, say, $300,000.

The amounts may be changed either way by the future developments of the scheme, but as the matter now stands the above figures are in contemplation by our company.

Very truly,

(Signed) J. C. SHORT, *Pt.*

P. S.—I hand you herewith a list of our stockholders at this date. S.

The list is as follows:

NEW YORK, *December* 17, 1879.

L. L. Hubbard, Esq., Boston.

List of our stockholders of this date:

John C. Short	$47,500
William P. Watson	32,500
George W. Debevoise	25,000
73 Edward S. Watson	500
James T. Worthington	1,500
Charles S. Easton	1,000
William B. Strong	500
Homer H. Stuart	5,000
William K. Reed	5,000
	$118,000
In the treasury	82,000
	$200,000

The contract is set forth in the plaintiff's declaration and is made a part of this bill.

On cross-examination the plaintiff testified as follows:

Q. Before you made this contract of Dec. 17th, 1879, you had considerable negociation and correspondence with Mr. Short, commencing in 1878, had you?

A. Yes, sir.

Q. During that correspondence did you ascertain fully about the company, its charter, by-laws, and board of directors?

A. No, sir; I did not ascertain about its charter and by-laws excepting that Mr. Short, at my request, sent me, through Mr. Watson, a copy of the by-laws.

Q. Didn't he send you a copy of — charter?

A. He gave me a copy, or let me see the charter, which I copied.

Q. You read the charter through before you made this contract, did you?

74 A. I did.

Q. You read the by-laws then in force?

A. I did.

Q. You knew who the officers were and who constituted the board of directors?

A. Yes, sir. That last letter read reminds me that in answer to it Mr. Short did send a resumé of the office of the company, and a number of copies of letters of introduction and recommendations from various parties in Illinois, introducing Mr. Short and Mr. Watson.

Q. You knew who the directors were?

A. Simply by information from Mr. Short.

Q. Who were the directors?

A. He informed me they were himself, Mr. Watson, Mr. Debevoise, Mr. Reed, I think, of Chicago, and Mr. Strong.

Q. There were five directors then, were there?

A. I believe so.

Q. You knew that?

A. Yes.

Q. Now, what was there that you didn't know about this company before you made that contract of Dec. 17th, if anything?

A. That is a difficult question to answer.

Q. Well, you knew all about it, didn't you?

A. I suppose I knew substantially what the company was.

75 Q. Have you since learned of anything you did not know?

A. I have since heard of things about one of the gentlemen in the company that I did not know at that time.

Q. I mean about the corporation, the charter and by-laws, or about its board of directors, as it then stood, and its whole organization?

A. I don't know that I have heard anything since that time, excepting that people have expressed doubts as to the validity of some of the acts of the corporation done previously to my connection with it.

Q. That is all?

A. Yes; I believe that is all.

At a directors' meeting held on the twenty-seventh day of December, 1879, at the call of the president, at which three of the five directors of the defendant corporation were present, viz., Messrs. Short, Debevoise, and Watson, it appeared that the president reported an agreement made with Mr. Hubbard, by which Mr. Hubbard assumes the superintendence and management of the company's affairs in the States of Maine and Massachusetts, with such other territory as, in the judgment of the board hereafter, may seem to the interest of the company, which action was ratified. It did not appear

76 by any record produced at the trial that there was any other reference to or mention of any contract with the plaintiff in the company's records until after the question had arisen as to the claim involved in this suit.

It further appeared from said records that at the same meeting "a motion to elect Mr. L. L. Hubbard a director was unanimously carried;" that "a motion was made to create the office of assistant vice-president, which prevailed, when it was moved and unanimously carried that Mr. L. L. Hubbard be appointed to the office of assistant vice-president, with office in the city of Boston."

In pursuance of the contract the plaintiff attended several of the directors' meetings held thereafter, and under the direction of the defendant's officers the plaintiff proceeded to open in Boston a branch office of the defendant corporation, receiving all his instructions as to details from the said John C. Short, president. The plaintiff had previously performed that term of the contract which required him to sell or purchase ten thousand dollars of the stock of the defendant

company by taking and paying for it himself at par. This purchase was made Dec. 24th, 1879, at which time he first became a stockholder. June 5th, 1880, he was elected a director by the stock-
77 holders at their annual meeting in Chicago, Ill., but no other evidence was put in of what took place at said meeting.

The plaintiff attended directors' meetings at the branch office in New York in January, 1880, and several of the meetings held subsequently.

The only clause of the by-laws relating to the election and meetings of directors *are* as follows:

By-Laws as Amended June 7, 1879, and in Force when Plaintiff's Alleged Contract was Made.

Article I.

SECT. 1. The board of directors shall consist of not less than five nor more than thirteen stockholders, and their election shall be held on the first Saturday of June of each year at eleven o'clock a. m. at the principal office of the company, unless otherwise directed by the board of directors. Such election shall be by ballot, and the name and number of shares voted on shall be endorsed on the ballot, each share having one vote, and a plurality of votes shall elect. Every shareholder shall be entitled to one vote for every share of capital stock standing in his or her name on the books of the company, and he may vote in person or by proxy.

78 SECTION 2. Each new board immediately after its organization shall appoint a president, vice-president, treasurer, and assistant secretary, and such other officers as the business of the company may require.

Article 2.

SECT. 2. A majority of the directors shall be a quorum for the transaction of business.

SECT. 5. The directors are authorized to hold special meetings at the office of the company, in the city of New York, to be called in the same manner as other special meetings.

The last section was adopted at the regular annual stockholders' meeting of the company, held at its office, in Chicago, 7th June, 1879.

Article III.

It shall be the duty of the president to exercise a general direction and supervision over all the affairs of the company as its interests and security may require.

It did not appear that there was any vacancy in the board of directors at the time of the directors' meeting on 27th Dec., 1879, above referred to, but the secretary's notice to Hubbard contained the following words:

"You were duly and unanimously elected a director to fill one of the existing vacancies."

Five directors were elected by the stockholders in June, 1879, for

the year following, and were in office December 27th, 1879, and subquently.

The plaintiff performed all the services required of him
79 during the year fixed by his contract with defendant company and had been paid $1,800, and been reimbursed all outlays, as provided in the contract of December 17th, and during said year had rendered monthly accounts to the New York office, as required by said contract, to which accounts no objection had ever been made. Apart from the transaction here in question it appears that in no month, nor in all the months covered by the contract, had the gross profits exceeded the sum of fifty-four hundred dollars plus the book-keeper's salary provided for in the contract. In the month of June, 1880, no profits were earned by the defendant on any business in any way connected with New England, except by the transactions here in question.

With reference to the business covered by the accounts the plaintiff testified:

Q. Did the business you did, apart from the business in question which you have claimed to have done or assisted in doing, produce a serious amount of profit to the company?

A. No, sir; I should not say it did.

Q. How much gross profit did it produce?

A. I never have reckoned it up, because on some of the transactions I never knew what the commissions were to be.

Q. Did you have a settlement at the end or an accounting on all the business which you had done during the year?

80 A. No, sir. I never asked one, because I knew the amount of business done would not reach the amount of $5,400 profit.

Q. Outside of this transaction?

A. Outside of this transaction.

Q. Can you show or will you undertake to show me that there was any profit accruing to that company from the business you did during that year apart from this transaction in question here?

A. There certainly was more gross profit accruing to them, but I can't tell you whether the amount of that profit exceeded the expenses of the Boston office or not.

Q. On the expenses of the transaction themselves can you say that?

A. I think so, sir.

Q. You don't undertake to say that upon a strict accounting they would show any gross profits, do you?

A. Well, there is always supposed to be a profit on these things; the mere handing over a bond, transferring it to another party, made a profit of some amount.

Q. Yes; but still there might be charges connected with the transaction in any given case, might there not?

A. I never knew of any.

Q. Well it is possible, isn't it.

81 A. I don't think so, sir. I don't think the company did business in that way,

He further testified :

Q. Now you say you sent in a statement of account at the end of every month ?

A. Yes, sir.

Q. On any of those accounts so sent in did these Burlington transactions anywhere appear ?

A. No, sir ; except perhaps advertisements paid for on that account.

Q. I mean to say did you anywhere, in any of your statements of the business done at your office during the year, claim any profit out of the Kansas City & Burlington transaction ?

A. No, sir ; because none of the money was handled by me, and my accounts contained only——

Q. You have stated here what the amount of profit was, and you claim that you are entitled to one-third of it.

A. Yes, sir.

Q. Why didn't you put it into some of these accounts ?

A. Because the Boston office accounts contain only cash accounts or bond accounts ; any bond that came into my hands, and was delivered by me to a third party, was credited to the New York office and charged to my office.

Q. Wasn't it your duty, if you had any claim accruing to
82 you in that way, to make a statement of it in these monthly statements ?

A. No, sir ; that appears in my notice of the 2nd of July.

Q. What notice ?

A. My notice which has been put in evidence here that I intended to make a demand for commissions.

It did not appear that there were any losses coming from any business originating in the eastern division or transacted at the Boston office during the time of the plaintiff's employment. It appeared that, th-ough a contract with the Kansas City, Burlington and Santa Fe Railway Company, of which W. H. Schofield was then president, the defendant had for sale certain bonds of the Kansas City, Burlington and Santa Fe Railway Company, and in order to place these bonds before other railroads and investors it had issued a circular dated May 15th, 1880 (a copy of which is hereto annexed, marked "B," and made a part of this bill of exceptions), offering for sale these bonds, which were to cover not only the extension of the road beyond Burlington, Kansas, but also that portion of the road already built, viz., from Ottawa to Burlington. On this completed portion of the road of about forty-five miles there were already out-
standing six hundred thousand dollars of first-mortgage bonds,
83 which were to be taken up and cancelled from the proceeds of the new bonds offered in this circular.

On the 14th of May, 1880, a number of these circulars were sent in bulk by post to the plaintiff at Boston for distribution. The plaintiff sent these circulars to several persons and testified as follows as to interviews on the 23rd and 24th day of May, 1880, with S. Lothrop Thorndike, the comptroller of the Atchison, Topeka and Santa Fe Railroad Company, a corporation organized under the

laws of Kansas, whose line of railroad and home office are in Kansas, but whose principal business office is in Boston:

Coming home from church, with my wife, we joined Mrs. Thorndike, who told us that Mr. Thorndike had just returned from Santa Fé and the West, and asked us to come in and see him. We went into the house and saw Mr. Thorndike, and, after asking him about his trip to the far West, I told him, after asking him whether the A., T. & S. F. R. R. Co. had taken action with reference to the K. C., B. & S. F. R. R. Co. *I told him* that we had control of the road in our hands.

Q. Whom did you mean by "we?"

A. The investment Co.; that we had issued and were issuing circulars asking for subscribers to the bonds of the company, and that it was intended to build that railroad beyond its present ter-
84 mini westward and possibly eastward to Kansas City, and asked him, as I have already stated, whether his company took any action with reference to this road to get it out of the way.

Q. What was said, if anything, by Mr. Thorndyke?

A. Mr. Thorndyke said that the company was mentioned by them at the time of the stockholders' meeting, together with several other companies which bore directly or indirectly on them, but that nothing was done about this road—no special mention was made of it.

Q. Then you saw him the next day at your office?

A. I promised to send him one of the circulars, which he said he had not seen, and the next afternoon between half past four——

Q. Had you sent him one of the circulars?

A. I had not. The next afternoon, Monday, between half-past four and five o'clock, he came to our company's office.

Q. What was said?

A. He said to me, "Mr. Hubbard, you have not sent me that circular," and I apologised by telling him that I had expected to see him and give him a circular. He asked me a number of questions about the road which I had substantially answered the day previously, and asked me where Mr. Scofield was. I told him
85 that he was in New York at our company's office.

Q. Who was Mr. Scofield?

A. Mr. Scofield was president of this Western R. R. and the Kansas City, Burlington and Santa Fe.

Q. What more was said at that interview, if anything?

A. Just as Mr. Thorndike was leaving I said to him, "Mr. Thorndike, if the investment Co. can sell this road to your company, will you buy it?" He laughed in his pleasant manner and said he, "Well, I don't know," and went off.

The following letters and telegrams were put in evidence:

BOSTON, *May 25th*, 1880.

J. C. Short, Esq., pres., 31 & 33 Pine street, New York.

MY DEAR SIR:

* * * * * * *

Mr. Thorndike came back from the West yesterday. He says

people out there think we are fishing hard for the Chicago and Alton. I gave him a circular. If the A., T. & S. Fé will take us, can we sell to them?

Very truly, LUCIUS L. HUBBARD, *A. V. P't.*

86 (In pencil:) Send more of those circulars.

H.

NEW YORK, *May 26th*, 1880.

L. L. Hubbard, Esq'r., ass't V. P., Boston.

MY DEAR SIR: Your favor of yesterday is at hand and noted.

* * * * * * *

Mr. Thorndike's return from the West is noted; also his statement that "people out there think we are fishing hard for the Chicago and Alton." What is that intended to mean—that we are working in the interest of the Chicago and Alton, or that we are endeavoring to secure an ancillary relation to that Co.? To both which inquiries I may say to you "We confess."

That is to say, our Co. has in hand all the first-mortgage bonds and a majority of the stock of the K. C., B. & S. F. R'y Co. We want to dispose of both. Any strong company can procure the stock (maj.) by guaranteeing the bonds. By our agreement with the R'y Co. and the Farmers' Loan & Trust Co. there can be no misappropriation of the bonds or the proceeds. Hence their guarantee would not cover bonds on uncompleted road. Such a guarantee creates a minimum liability. And more, the guarantee brings the money on all the bonds *pro rata*, as road is built, and that
87 creates a valuable and productive property, and that makes money for the guarantor and us. So it is a desirable thing to all parties.

And this brings me to reply to your question, "If the A., T. & S. F. will take us, can we sell to them?" Yes, and if they are wise they will. Parties in the interest of Jay Gould or the Mo. Pacific are now busily engaged in figuring to obtain our road, in order that we may not build from Ottawa (which point the Mo. Pacific now reaches from Holden, Mo.) to Kansas City. The Mo. Pacific want the line from Ottawa to Wichita, so as to compete with A., T. and S. F. & S. L. & San Francisco.

Mr. Thorndike couldn't do a better thing for the A., T. & S. F. than to have that Co. absorb us. Suppose you see about it at once, without disclosing at present what we will do, but indicate to him that you can get it for his Co. on terms his Co. can afford to take it on.

Very truly, J. C. SHORT, *P't.*

BOSTON, *May 27th*, 1880.

J. C. Short, Esq., pres., &c., 31 & 33 Pine St., New York.

MY DEAR SIR: Your favor of the 26th inst. came to hand this morning, and contents duly noted.

* * * * * * *

88 I had an interview with Messrs. Thorndike and Coolidge

and stated to them that we could give them a majority of the stock on the entire road from Kansas City to Wichita if they would buy part of the bonds and guarantee int. on the bal. Mr. Coolidge smiled and said that they could themselves build from Burlington to Wichita and have all the stock without paying any commission on sales of the lands. He then asked me if we were authorized to sell that part of the road which is now built, and, on my answering in the negative, requested me to write you to-night and get you to telegraph to-morrow on just what terms they could purchase the road from Ottawa to Burlington. He added that his Co. having acquired that line could then "build slowly towards Witchita and see how it paid," which conveyed the impression to my mind that they would be only too glad to try the experiment.

Mr. C. does not think Gould cares to "get in" there at all. He will be out of town on Saturday, and hence his wish to have a proposition by wire to-morrow. I told him there was about $325,000 owing on the road now, but declined to say who the creditors were. He figured considerably on the 600 M. bonds, and evidently is somewhat anxious. I don't suppose our Co. would consent to make any
89 trade in the way desired by Mr. C., nor do I suppose Mr. Schofield would care to throw his chances away so entirely. Our best hold is evidently with some other road.

* * * * * * *

Very truly yours, LUCIUS L. HUBBARD,
Ass't Vice-Pres.

NEW YORK, *May* 28, 1880.

L. L. Hubbard, Esq., ass't V. P., Boston.

MY DEAR SIR: Your favor of yesterday is before me and has been considered.

* * * * * * *

In relation to your interview with Messrs. Coolidge and Thorndike, I may refer to my two telegrams of this date, the first intended for your own eyes and the second for Mr. Coolidge. The first was to put you on your guard preparatory to the receipt of the second. Forewarned is forearmed. On Wednesday we were called upon by Mr. Worden, of Worden and Co., bankers, 48 Wall street, who made the same inquiry Mr. Coolidge made of you, and received the same reply, except that we did not disclose the "325,000" owing on the road now. He pressed me for terms upon which we would
90 transfer and deliver the 45 miles, and I declined to make any. He said he represented an interest that wanted the property in earnest. Upon being pressed still harder for some kind of terms, I finally told him that if the party he represented owned either one of the trunk lines reaching Kansas City would guarantee the bonds of the K. C., B. & S. F. R'y Co. from K. C. to Witchita ($3,500,000), and the guarantor Co. was satisfactory to us, we would give such Co. a majority of the stock of our road, or if that Co. would buy $\frac{6}{10}$ of all our bonds at 90 and int., as per circular, we will still give maj. of stock or lease for 99 years. He finally said: "I will submit these

propositions and see you to-morrow," which was yesterday. He did not return yesterday, and, fearing he might not return at all, I wrote a letter to C. E. Perkins of the C., B. & Q., Burlington, Iowa, of which, and also of his letter to me, I enclose copies.

To-day Mr. Worden called and said: "I have a crow to pick with you." I replied: "Indeed! On what account?" He said: "Are you not corresponding with parties in Boston about this matter?" I said: "No, sir." Then he said: "Didn't a representative of your Co. have an interview with Mr. Coolidge yesterday in Boston?" I said yes. He then stated to me something like this: "Mr. Short, Mr. Gould, & the A., T. & S. F. people are entirely in accord.
91 I represent one of those parties. I don't represent Mr. Gould."
Of course the conclusion was irresistable he represented Mr. Coolidge. So I have to announce that the field of negotiation has evidently been transferred to New York, and the request that until I can see you you will be "dumb as an oyster." Refer all inquirers to this office, and don't let anybody know that anything is going on here with either the A., T. & S. F. or C., B. & Q.

Mr. Worden pressed me so hard for some kind of an intimation as to what we could entertain that I promised him if he would return in an hour I would say something more. This relieved him greatly, and five minutes before the hour was up he was back, hotter than ever. And here I was put on my mettle and had to command all my resources. During the hour I sent out for Mr. Rolston, and we four held a council of war and determined on what course to persue. In the meantime we learned from Mr. Schofield, who was in the back office, what sum of money would justify him in letting them have the 45 miles and possession, and how much it would take to provide for other people, including Mr. Hale, and we then made him some suggestions, but no offer. I told him if his principals would offer par for $590,000 of the $600,000 bonds issued on
92 the 45 miles, accompanying the offer with the requirement from us that we shall give them 52 p'r c. of the stocke of the R'y Co., I would submit it to Mr. Schofield and advocate its acceptance. This seemed to give him great relief and he got up quickly and said he would have the suggestion on the wire inside of an hour, and would advise its acceptance without delay.

We have agreed with Mr. Schofield as to what he is to have and we get the balance, which we have decided will justify us in letting go. So you see my telegram to you, intended for Mr. Coolidge's market, went right to the spot.

I've not time to write more. The 6-o'c. work whistles are now blowing and I must go.

Yours, J. C. SHORT, *Pt.*

NEW YORK, *May* 28, 1880.

L. L. Hubbard, ass't V. P. 19 Congress:

For your exclusive information and referring to my telegram to follow keep C. and T. on the books for Schofield's forty-five miles as last resort.

J. C. SHORT, *Prest.*

NEW YORK, *May* 28, 1880.

L. L. Hubbard, ass't V. P., Boston, 19 Congress St:

Mr. Schofield has purchased rails and fastenings to lay re-
93 mainder [of] tract from Kansas City to Wichita. Negociations are pending with three other interests for purchase or lease of the property; hence cannot sell forty-five miles at present, but can treat with Coolidge for line from Kansas City to Wichita.

J. C. SHORT, *President.*

BOSTON, *May* 28th, 1880.

J. C. Short, Esq., pres., &c., 31 & 33 Pine St., New York.

MY DEAR SIR: Your telegrams came to hand this morning and I forthwith sought an interview with Mr. Coolidge and showed him the one intended for him. He read it carefully and said he did not want to buy the whole road, but would buy the 44 miles, and would take off of Mr. Schofield's hands the rails, &c., which he could himself use. I then reiterated the statement in your telegram that we could not at present sell him what he wanted, and that I had no authority to say anything looking to that end, but would be glad to have him make an offer, which I could report to you. He smilingly replied that he would not make an offer unless the property were brought to him to buy. I then asked him if a proposition like the following would meet his views, to wit: He to buy $178,000 bonds and guarantee int. on 350,000 more, which last lot we
94 might use to cancel the present debt of the road, say $325,000. That would leave 350 M+178 M=528 M bonds on 44 miles of road, or about 12 M per mile. Without thinking much Mr. C. said that was entirely too much to pay per mile, but when I told him he was not paying at that rate, because the proceeds of the 178 M would go into the treasury, he pertinently asked what was our object in asking him to buy the bonds. I frankly said that the "cat in the meal" was that we wanted to make our commission on them. He agreed that was fair, and said if we would deliver him the control of the stock (which, I suppose, means 51% of it) he would be glad to consider some such proposition, and asked me to report next Tuesday.

I am sorry now that I did not put the figures higher, as I confidently believe that they (the Atchison people) are afraid to take the chances of some other road getting control, and would be glad to pay a good round sum to make that impossible. Of course the way is open and unobstructed for our Co. to name higher terms, as my talk was simply talk; and I strongly recommended a "larger dividend" on these 44 miles, if we have to lose our hold on the bal. of the road. If the guarantee the bonds I suppose we can sell them for upwards of par and have 30 M dollars left after paying off the debt. We might ask them to buy 250 M, bonds or pay us
95 our com. on the same. If they buy them, that — entitled us to our 10 per cent. of stock, I suppose. Perhaps they would agree to continue to build under the K. C., B. & S. F. charter as far at least as Wichita, so as to make the bonds cover that entire stretch

and let us have the selling of the bonds hereafter to be circulated. This we could do at regular rates, and it would help our Co. to be known as "agent of the A., T. & S. F. R. R."

This talk of mine is, of course, rambling. I dare say you have by this time digested a plan or offer which we can lay before Mr. Coolidge, and which will meet all the requirements of the case on both sides. If our offer should suit Mr. C. I have no doubt it will be promptly taken up, and possibly this fact might have some weight in inducing us to take the "bird in the hand" rather than lose it in our attempts to catch the "two in the bush." But of this you are the better judge.

* * * * * * *

Boston takes a holiday to-morrow, and a great part of it takes Monday, too. I go to Chester, N. H., probably, to-morrow, with Mrs. H., and shall be back Monday a. m., about 11 o'clock. If this R. R. negotiation does not keep me here next week I want to go down East on Tuesday or Wednesday, but I hold myself at your disposal.

* * * * * * *

Very truly,

LUCIUS L. HUBBARD,
Ass't Vice-Pres.

96 NEW YORK, *May 29th*, 1880.

L. L. Hubbard, Esq., ass't V. p't, Boston.

MY DEAR SIR: Your favor of yesterday rec'd. It was rather refreshing to us to read that Mr. Coolidge "did not want to buy the whole road, but would buy the 44 miles and would take off of Mr. Schofield's hands the rails, &c., which he himself could use." We expect to cause more rails to be added, rather than to sell those already laid.

I regret that you made any figures to him, but we can get over all of them satisfactorily except the $178,000 which you say you told him that he was not paying at that rate ($12,000 per mile), 'because the proceeds of the $178,000 would go into his treasury." Of course you will have seen from my letter of last night that that cannot be. The $325,000 is about the amount held by Hale and other creditors, and does not represent what has been advanced by the promoters and others who, to help Mr. Schofield along, allowed their bonds to be pledged to Mr. Hale along with Schofield's. The A., T. & S. Fe cannot afford to have Mr. Schofield's road pass to any other Co., and become a competitor at Wichita, and Mr. Coolidge evidently intends to buy our road.

This morning Mr. Schofield rec'd a polite note from Mr.
97 Worden, in which he said: "I am in receipt of a letter from Mr. Coolidge this morning requesting me to say to you that he wishes to see you in Boston immediately in relation to your road." Mr. Schofield was out at the time. In an hour another note came saying "I have just received a telegram from Mr. Coolidge asking you to come over to Boston." We "couldn't see it." Mr. Schofield is a true man. He brought the letters directly to me and said: "What

shall I say in reply?" We prepared his reply. I enclose a copy. Mr. Schofield is out of town. I can "go to Boston" if it shall become necessary. We are masters of the situation, *and* as you aptly put it, by strongly recommending a "large dividend on these 44 miles if we have to lose our hold on the balance of the road. If the "44 miles" goes by itself we want no "guarantees" on bonds—simply cash down.

I indicated to Worden yesterday that we might entertain a subscription for our bonds covering the line from Ottowa to Wichita under certain circumstances. That would give our Co. $225,000 com's—10% on $2,250,000—$15,000 per mile on 150 miles. This plan is in accordance with your suggestion near bottom of 2nd page of your letter, and would be better than nothing, rather.

We expect a reply from Perkins, C., B. & Q., Burlington, Iowa, Monday—possibly to-night.

98 If it comes before Worden closes he will be too late. I am now satisfied that this matter has been stewing here for a week past, but they didn't get to a point until Worden came in Wednesday. I would not be surprised if it was closed Tuesday and the money deposited in F. L. & T. Co. So mote it be.

More anon.

Very truly, J. C. SHORT, *Pt.*

P. S.—I repeat my former request, "Say nothing to anybody."

We settled $6,000 old "town of Sangamons" yesterday, using $8.000 new and $710 in money. Our com's, $687. Sangamon t'p bond No. 1, now at your office is ours, and is charged to Boston office; is for sale at anything above 96 & int'r.

(Copy enclosed.)

31 PINE STREET, NEW YORK, *May* 29, 1880.

D. T. Worden, Esq., 48 Wall street, city.

DEAR SIR: I have to acknowledge the receipt of your communication of this morning, informing me of the desire of Mr. Coolidge, pres't of the A., T. & S. F. R'y Co., for an interview with me at Boston on the subject of the Kansas City, Burlington and Santa Fe railway.

99 Replying, I have to say that, under the provisions of an agreement which has been entered into between the Kansas City, Burlington and Santa Fe Railway Company and the New York, New England and Western Investment Co., of 31 and 33 Pine street, this city, and which was ratified and confirmed by the stockholders of our railway company at their annual meeting held in Burlington, Kansas, on the 31st day of March last, I have placed in the hands of said investment Co. all the first-mortgage bonds of the Kansas City, Burlington and Santa Fe Railway Co. and a majority of its stock, with full power and authority to dispose of all or any part or portion of said bonds and a majority of the said stock, and I am not now at liberty to interfere in any manner with the negotiations of that company.

As president of the Kansas City, Burlington and Santa Fe Railway Co., and on its behalf, I will carry out any contract or agreement which the investment Co. may make with Mr. Coolidge or any other parties in relation to the disposition of our road or its bonds and stock. I therefore respectfully refer you to the investment company.

I had, previous to receiving your note, made arrangements to go out of the city, and hence cannot now do myself the pleasure of accepting your invitation to call at your office this morning.

Very respectfully, WM. H. SCHOFIELD, *Pres't.*

100 P. S.—Your second note is received just as I close this.
W. H. S.

BOSTON, *May 31st*, 1880.

J. C. Short, Esq., pres., &c., 31 & 33 Pine St., New York.

MY DEAR SIR: Your favors of the 28th and 29th inst. were duly received to-day on my return from Chester and progress noted. Agreeably to my promise, I called on Mr. Coolidge and told him I had little to say farther than to report that I had heard from you, and that I had nothing to offer, inasmuch that our Co. understood that he had authorized parties in N Y. to treat for the road directly with Mr. Schofield or with us, and I mentioned Mr. Worden's name. Mr. C. said he did not know Worden in the matter, and had simply requested Mr. Higginson to request Mr. Schofield to come over here, because he thought him the man in authority. He supposed Mr. Higginson had asked Worden to see Schofield, and had since been shown Mr. S.'s reply, and now understood that we had the entire matter in our hands. I said that was so by virtue of a contract we had made with Schofield. Mr. C. then said it would be impossible for him to go to N. Y., and I said if he desired to see you I thought you might be able to come over here.

101 "Very well; if Mr. Short wants to sell the 45 miles of road I should be glad to see him here after next Wednesday."

He wants you to bring a copy of the charter, statement of length of road, debt, construction, and everything of importance. He laid special emphasis on the fact that if they continued to build the road (of course they will) they wanted the entire stock of the new part, and at the same time assured me that the stock of the road would never be worth anything; that terminal facilities in K. C. are very costly, &c., &c., through all of which it did not take great perception on my part to see clearly.

He also asked whether the road had the right under its original charter to build beyond Wichita, and I think he considers that fact important. He also let drop the remark that "in the country it costs about 10 M per mile to build a R. R." He ended the interview by saying that if you had any reasonable proposition to make, so as to make it worth while to have a committee appointed by the directors of the A., T. & S. F. R. R. Co., you might first see

him, and then, if desirable, he would have the committee appointed.

I don't think, from his remarks, nor those of Mr. Thorndike, that they will be likely to make all the concessions you desire, and it is desirable not to make our terms so high as to drive them
102 away at the outset, but, on the other hand, I think they want the road enough to be willing to pay us handsomely for it.

* * * * * * *

Please direct me whether to stay here this week or go to Maine. If I wait it will be on ac. K. C., B. & S. F. matter.

Very truly,

LUCIUS L. HUBBARD,
Ass't Vice-Pres.

P. S.—I corrected my statement to Mr. Coolidge to-day about the debt, and said the 600 M bonds represented much more than 325 M expenditure. H.

NEW YORK, *June 1st*, 1880.

L. L. Hubbard, Esq., ass't V. P., Boston.

DEAR SIR: Your favor of yesterday received and duly noted. I regret that you mentioned Mr. Worden's name to Mr. Coolidge, for you see he didn't "know Mr. Worden in the matter." That goes to show that where a direct negotiation is pending between parties everything not necessary to be disclosed should be kept back.. These are delicate things to handle; hence my injunction to you to be "dumb as an oyster." A shrewd game is being played with
103 us by Mr. Coolidge in Boston and his bankers here, Chase and Higginson, and it stands us in hand to be "wise as serpents."

You may say to Mr. Coolidge that you wrote me the result of your interview of yesterday with him, and that in order that an understanding may be arrived at intelligently you have requested me to come to Boston Thursday for an interview with him; that I have advised you by letter received this (to-morrow) morning that if he (Coolidge) wishes, I will come on receipt of a telegram from you, and will bring Mr. Schofield.

If I shall not receive your telegram as a result of your interview or advices of to-morrow, I will come anyhow and bring Mr. Schofield, in response to Mr. Coolidge's request as conveyed to me in your letter of yesterday. We cannot afford to let the opportunity go by for a trade with Mr. C., if one can be made on terms that will justify, but we cannot afford to either cheapen the property by naming low figures, nor appear as "offering" ourselves. We will be over unless telegrams to be received to-morrow or interviews here shall change the programme, in which event you will be duly advised by wire.

In response to Mr. Worden's request to Mr. Schofield to call at his (W.'s) office Mr. Schofield did so to-day, and Mr. W. seemed provoked because Mr. S. didn't call Saturday and post off to Boston Sat.
104 night to see Mr. C. yesterday. Mr. Worden will write to Coolidge to-night saying that he and I will go to Boston if

desired; but don't let Mr. C. know that you know Worden is to write or otherwise correspond with him.

The Boston Advertiser of yesterday had this paragraph in it—you may have seen it: "Negotiations are pending with three interests for the sale or lease of the Kansas City, Burlington and Santa Fe Railway Company. One of the negotiating parties is supposed to be the Chicago, Rock Island and Pacific Railroad Company."

* * * * * * *

Very truly, J. C. SHORT, *Pt.*

BOSTON, *June* 2, 188–.

J. C. Short, pres't, 31 & 33 Pine St.:

Letter and telegram received; have called on Coolidge, but he was out; shall try again later.

L. L. HUBBARD,
Ass't V. P.

BOSTON, *June 4th*, 1880.

J. C. Short, Esq., pres., 31 & 33 Pine street, New York.

105 MY DEAR SIR: Enclosed please find ac. of Boston office for May, which I trust is correctly stated and cast.

* * * * * * *

I haven't heard a word to-day about K. C., B. & S. F. but think the silence is ominous and forbodes us good. If I were the Co. to-day I wouldn't discount our chances for less than $75,000. I mean I wouldn't take less than that sum for our contract. I suppose Billings will write you this evening. He has not been in here to-day. Your talk with him was time well spent. May the same be said of your interviey with Mr. Coolidge.

* * * * * * *

Very truly, LUCIUS L. HUBBARD,
Ass't Vice-Pres.

NEW YORK, *June 6th*, 1880.

L. L. Hubbard, Esq., ass't V. p't, Boston.

MY DEAR SIR: Your favor of yesterday rec'd. * * * I note your hopeful $75,000 remark about K. C., B. & S. F. We have very confidential telegram from Mr. Watson this morning, in which he reports that on rec't of our "circular" by Mr. Strong he (Strong) at once notified Mr. Coolidge that they must take it in and that Mr. Strong instigated the negotiation in the first instance. Watson says, in his telegram, that he has had full interviews
106 with S., and adds: "It is my judgment that you can stand firm for $10,000 p'r mile." How's that?

But "mum is the word." Nobody must know that we have seen Strong.

Yours, J. C. SHORT, *Pt.*

BOSTON, *June 7th*, 1880.

J. C. Short, Esq., pres., &c., 31 & 33 Pine street, New York.

MY DEAR SIR:

* * * * * * *

My courage is excellent in rec. "Burlington, etc.," and has been so for some time. I think we shall all feel pretty happy before many days; at least, I trust nothing will happen to make the N. Y. office unhappy. No news to-day as yet from Coolidge.

* * * * * * *

Very truly, LUCIUS L. HUBBARD,
Ass't Vice-Pres.

P. S.—Mr. Coolidge has just sent up here, and wants you to be here Wednesday a. m. at 10 o'clock, to meet committee. He will telegraph you.

H.

107 BOSTON, *June* 7, 188–.

J. C. Short, 31 & 33 Pine St.:

Mr. Coolidge wants you to be here Wednesday, at ten o'clock, to meet committee.

L. L. HUBBARD,
Ass't Vice-Pres't.

NEW YORK, *June 7th*, 1880.

L. L. Hubbard, Esq., ass't V. P., Boston:

DEAR SIR: Your telegram received. Mr. Schofield and myself will go to Boston to-morrow night and be there Wednesday morning, as requested—*i. e.*, as you requested me. I shall bring Mr. Schofield for several reasons.

Hastily y'rs, J. C. SHORT, *P't.*

On the twenty-seventh day of May, 1880, the plaintiff had an interview with the said Coolidge, the president of the Atchison, Topeka and Santa Fe Railroad Company, as to which he testified as follows:

"The first part of the interview was in Mr. Thorndike's office. He took me into an adjoining room, where the president was
108 at his desk, and I had one of the circulars with me, on which I had written Mr. Thorndike's name. I opened it and asked Mr. Coolidge whether I could open negotiations with him with reference to that road—the Kansas City, Burlington & Santa Fe road."

Q. What did Mr. Coolidge say?

A. Mr. Coolidge wanted to know some facts about the road—how much debt there was on it, how many bonds were outstanding, and the general condition of the road.

Q. Repeat the conversation as nearly as you can recollect it.

A. He wanted to know how many bonds there were outstanding of the road previously to the issuing of the circular. I told him there were $600,000 worth.

Q. Those were on the completed road?

A. On the completed road—44 miles from Ottawa to Burlington.

Q. Shown by the red line on that map?

A. Shown on -hat map. I told him I thought there was a debt of $325,000 on the road, for which debt these bonds were holden or most of them.

Q. Did you tell them who had loaned the money?

A. No, I did not. I simply said I thought there was $325,000 of debt.

Q. For which how many mortgage bonds were held?

A. There were 600 mortgage bonds, each of $1,000.

109 Q. The whole of them were held for the debt of $325,000?

A. No, sir; I said most of them. I think I told him 590. At any rate, I asked him if his road would be willing to subscribe for a part or the whole of the lands mentioned in the circular, and if he would do so, or would guarantee the interest on those bonds, that our company would give him a majority of the stock of that road, thus giving him control. He replied that his own company, under their charter, could build the road from Witchita, eastward, and have all the stock, so that there would be no object to them in buying this road or the bonds and getting simply a majority of the stock; that he wanted the whole road, and asked me whether I had any authority to name a sum for which we would part with the road. I told him that, without consulting Mr. Short and the others, I had not, at that moment. And then he asked me to telegraph Mr. Short, or write Mr. Short, and have an answer by telegraph the next day, which would be Friday, as he was going out of town Saturday, to be gone over Sunday; he would like to know if our company would name a price for which they could have this road; and I asked him then if he would give me some figures, supposing we could sell the road, and, referring to the bonds again, I asked him whether he could

110 not subscribe for a certain number of them or guarantee the interest on them, and named a sum (just what it was I do not at this moment recollect) which I thought would be likely to cover any demands which our company would make.

Q. The price at which you thought they would sell?

A. The price which I thought they would sell at, reckoning the amount of the debt, which I thought was $325,000, which our company would have to pay.

Q. That is, pay to redeem the $600,000 of bonds?

A. To pay the $600,000 of bonds. Then I told him frankly he wanted to know what was "the cat in the meal." I said that our company wanted a commission. He said that was very proper; that he would be very happy to pay a commission, and if they would only name a price he would consider it.

Q. That is, you wanted to sell in order to make the commission?

A. Yes, sir; I left him and went outside the railing. He followed me, and we sat on a sofa, near the door, and he said: "Now let me understand. You want to find out just how much your company will let us have the road for, and the bonds—all those bonds which

you have issued, and the first bonds on the road—and let me know about that."

Q. Let him know when?

111 A. Let him know by wire from Mr. Short. I left the office, and that day wrote at some length to Mr. Short.

Q. How long was your interview with Mr. Coolidge?

A. Half an hour.

He also testified as follows to an interview with Mr Coolidge on the twenty-eighth of May:

I took the second telegram, as directed, and gave it to him—showed it to him.

Q. About what time in the day did you see him?

A. It was in the forenoon.

Q. On Friday, the 28th of May?

A. Yes.

Q. What took place at that interview?

A. The result of the interview substantially was that he requested me to have Mr. Short come on to Boston to see him.

Q. Give the interview a little more in detail. State, to the best of your recollection, what you said to him when you went in.

A. I don't remember whether anything more was said in reference to the road, excepting that I corrected a statement previously made, that the debt of the road was $325,000. I told him I had been corrected on that point myself and wished to make the matter strai-t with him. I told him if he desired Mr. Short to come over to Boston I would send for him, and he said that he could not well see Mr. Short until after the following Wednesday.

Q. Why was it; did he give you the reason?

112 A. No, sir; unless it was because he was to be out of town.

Q. Was anything more said at that interview?

A. At this moment, I don't remember anything more.

Q. Is that, as nearly as you can recollect, what he said about your requesting Mr. Short to come on?

A. He said that he could not go to New York, but if Mr. Short could come to Boston he would be very glad to see him if he could sell the railroad, implying, or at least saying, that if he could not sell the railroad "he didn't care to see him."

He had a further interview with Mr. Coolidge on the thirty-first of May, as to which he testified as follows:

Q. What took place at that interview?

A. I told him that I understood that he was negotiating in New York, through other parties, through a Mr. Worden and he replied that he did not know anything about Mr. Worden, and had not so negotiated. Then I told him if he would like to see Mr. Short Mr. Short would come over to Boston or he could see Mr. Short in New York. He said he could not see Mr. Short in New York, but he would be glad to see him in Boston after the following Wednesday.

Q. Now, as to that, Mr. Worden, had you ever heard his name or

had you known anything of him before the mention of him in those letters of the 28th or 29th of May?

A. No, sir; I never had heard of him.

113 Plaintiff testified that the interview lasted only a few moments.

He had a further interview on June 2nd, as to which he testified as follows:

Q. Did you go to Mr. Coolidge to ascertain whether he wished them to come on?

A. I did go to Mr. Coolidge on Wednesday.

Q. Did you not find him in?

A. The first time I went I did not.

Q. Did you try again later?

A. I did.

Q. Did you find him in?

A. I found him in.

Q. What did he say?

A. I told him that Mr. Short would come over on Thursday for an interview on Thursday morning.

Q. What did he say?

A. He said very well.

June 7th Coolidge sent to plaintiff's office, requesting him to telegraph Short to come over the following Wednesday or Thursday. After this several interviews between the defendant's president and the officers of the Atchison, Topeka and Santa Fé Railroad Company took place at the office of the Atchison Company in Boston, at the first of which, on the third of June, at the time of Messrs. Short and Schofield's first trip to Boston on this business, the plaintiff
114 was present, but said nothing. The offer of Mr. Short to sell the Kansas City, Burlington and Santa Fé road was to include the sale of the Kansas City, Burlington and Southwestern.

Messrs. Short and Schofield came to Boston a second time June ninth and a written paper was signed at a meeting held at said office on the 10th of June, 1880. The defendant's president on being asked by the plaintiff if he should accompany him and Schofield to this meeting at the Atchison office said he did not need him.

A copy of said paper is annexed to the pleadings and made part of this bill of exceptions.

Another paper was made in New York city June 30th, 1880, a copy of which is annexed to the pleadings and made part of this bill, and on the same day the property was transferred and payment made in that city where said bonds were held in pledge. The plaintiff was present when the purchase-money was paid. As to this he testified as follows on cross-examination:

Q. You say you were in New York June 30th, 1880?

A. Yes, sir.

Q. For what purpose did you go there?

A. Mr. Short requested me to come over there to be present at a

meeting of the board of directors of the Kansas City, Burlington and Santa Fe R. R. The title was transferred to trustees be-
115 cause of some doubt as to the competency of the Atchison, Topeka and Santa Fe Railroad Company to purchase and hold the legal title of a non-connecting road. The purchase-money was all paid by the Atchison, Topeka and Santa Fe Railroad Company. The gross profits accruing to the defendant from this sale were admitted by the defendant's treasurer in answer to interrogatories propounded by the plaintiff to be over seventy-nine thousand dollars.

The plaintiff testified as follows:

Q. Now, up to Dec. 17th, 1879, hadn't you declined all of Mr. Short's propositions of every name and nature looking to an alliance by contract between you and the company?

A. I had declined Mr. Short's propositions, such as he made me, and I stated distinctly why in one of my letters, which I think is in evidence.

Q. The letter will speak for itself; I am asking you as to the facts. Now, then, after you made this contract of Dec. 17th, 1879, you proceeded to take steps and do acts?

A. Yes, sir.

Q. Were they done under that contract?

A. They were.

Q. You don't pretend to have done them pursuant to, or by virtue of, any other contract, do you?

116 A. No, sir.

Q. The transaction for which you sue here, this matter of the Kansas City, Burlington and Santa Fé R. R., was done, as you claim, by virture of the contract of Dec. 17th, 1879, was it?

A. That is what I claim—which contract, I understood, is disputed.

The plaintiff further testified as follows:

Q. I will ask you if you do not know it to be a fact that since you became a stockholder, commencing a very few days after you became a stockholder, a great many persons have become stockholders in that company in different parts of this country?

A. Yes, sir; I have been told so.

Q. Don't you know that at the time the Kansas City, Burlington and Santa Fé R. R. securities were sold, which are in question here, a great many people were stockholders, or had become such, after you had become a stockholder?

A. No, sir; I don't.

Q. You know that a number of other persons did become stockholders, don't you?

A. I don't know that; I can tell you all of the persons whom I supposed to have become stockholders.

Q. Who were they?

117 A. Mr. Tolman, $14,000, and Mr. Astor took $14,000 and transferred $4,000 to Mr. Roulston. Then, in Boston, Mr.

Foster $3,000, and Mr. Thorndike $3,000, up to the date of the sale of that railroad. That is all, in my recollection, that was sold, all of which I have any information.

Q. There might have been others?

A. There might have been others; yes, sir.

The plaintiff, as stockholder of the defendant Co., had received certain dividends. On this point he testified as follows:

On the first of July, 1880, I received a dividend of 20%; in February or April, 1881, 20%; also a dividend in bonds of 20%; in July, 1881, a dividend of 10%.

As to the first two dividends the plaintiff testified as follows:

Q. Now, these first two dividends, out of what money were they paid?

A. The first dividend of 20% I was notified was paid out of the general earnings of the company.

Q. Don't you know, as a fact, that it was paid out of the earnings in the Kansas City, Burlington and Santa Fé matter?

A. I presume it was, but all I know about it is what the secretary officially informed me by note of the directors.

Q. You knew, Mr. Hubbard, that it was paid out of that, don't you?

118 A. I have always supposed so.

Q. You know the second to have been paid out of the same profits, don't you?

A. I simply infer it; the same as I did the first payment; I consulted my counsel before receiving the dividends, and was advised that I did not in any way waive or affect my claim by receiving them. It appeared that there was nothing in the declaration or notice of the dividend to indicate from what source the profits came; the plaintiff was not present at any meeting where these dividends were declared.

The plaintiff further testified as follows:

Q. Did you at any time protest against making dividends out of that money?

A. I protested on the 30th of June, in Mr. Short's presence.

Q. Where?

A. In his office; when he hurried me into his office.

Q. Who was with him?

A. Mr. Short was alone.

Q. What did you say?

A. I said: "You cannot make a dividend of 20%; I wish to call your attention to the fact that I have a claim for commissions here, and I have not -- anything about it during the negotiations

119 between our company and Atchison from motives of delicacy, because, I thought, it might embarrass the company.

Q. Did you notify the board of directors that they should not make such a dividend?

A. No, sir; I did not; the dividend was made, I think, on the next day—the 1st of July.

Q. You did not protest to the executive committee, nor at any meeting of the board of directors or stockholders, against declaring a dividend out of that fund, did you?

A. No, sir; because I knew that the board was against me; I was never notified of any meeting for the purpose of declaring a dividend.

Q. You accepted the dividends?

A. I accepted the dividends after consulting counsel.

The plaintiff made the claim here sued for upon the defendant on June 30th, 1880, and at several subsequent times down to the time of bringing this suit. The following letters were in evidence:

BOSTON, *July 2nd*, 1880.

J. C. Short, Esq., pres., &c., 31 & 33 Pine Str., New York city.

MY DEAR SIR: Referring to our conversation of yesterday
120 I beg leave to repeat that I do not in any way waive my right to claim, under my contract with the N. Y. and N. E. & W. Investment Co., on- third part of the gross commissions (less about $5,500) earned by said company, or to which it may be entitled by virtue of the sale by it of the securities of the Kansas City, Burlington & Santa Fe Railway Co., consummated June 30th last past, but I do hereby reassert my right in all its force and solemnity.

Believe me in all sincerity, truly,

LUCIUS L. HUBBARD.

NEW YORK, *July 13th*, 1880.

L. L. Hubbard, Esq., ass't V.-president, Boston.

MY DEAR SIR: Your note under date of 2nd inst., in relation to the construction of the contract between yourself and our company, was duly received and has been fully considered, but it has not been convenient for me to reply sooner.

I am instructed by all the six directors now present in New York to write you in reply to your note that in no event can any claim which you think you have the right to make for one-third of the commissions which our company has realized, or may hereafter realize, from the sale of the Kansas City, Burlington & Santa
121 Fe railway bonds and stocks for Mr. Schofield be entertained or allowed by our company.

We all very much regret that you should have taken such a view of your rights in the matter, and hope that upon reconsideration you will see it as we do.

Very truly,

(Signed) J. C. SHORT, *Pt.*

At the directors' meeting 5th Aug., 1880, at New York, at which were present Messrs. Short, Watson, Rolston, Hubbard, and Debevoice, it appeared by the record that the board then proceeded to the consideration of the terms of the contract made with Mr. Hubbard

on Dec. 17th, 1879. At this meeting the contract of December 17th, 1879, was produced, and the plaintiff discussed with the directors at great length the merits of the claim made in this suit.

To show the course of dealings under the contract and the understanding of the parties as to the meaning of the words "business originating in the eastern division or transacted at the Boston office," the plaintiff introduced the following written memorandum, crediting him with profits on certain transactions.

JOHN C. SHORT, *Pres't.*
GEO. W. DEBEVOISE,
Vice-Pres't.
WM. P. WATSON,
Sec'y & Treas'r.

122 *Memorandum.*

NEW YORK, NEW ENGLAND AND
WESTERN INVESTMENT COMPANY,
NEW YORK, *May* 1, 1880.

To L. L. Hubbard, ass't V. pres't, Boston, Mass.:

Your office has credit for commissions on city of Toledo old bonds, exchanged April 30th with the Rollingsford, N. H., Sav. Bank ---------- $11,000
With the Portland, Me., Sav. Bank ---------- 5,000

$16,000, @ 2%, $320, as per statement enclosed in your letter of that date.

The plaintiff testified that the bonds referred to were issued by the city of Toledo and sold under a contract made in the city of Toledo by the investment company with that city, and that he had nothing to do with the earlier stages of the business until he negotiated the sale of these bonds in Massachusetts and Maine, as noted in the memorandum.

There were also put in the following portions of letters from John C. Short, president, to the plaintiff, of January 17th, 1880, Feb. 11, 1880, and May 10, 1880:

Short to Hubbard.

"JAN. 17TH, '80.

"Jos. Farnham, Augusta, Me., is said to have some town of West Lincoln bonds. He is in your bailiwick; nail him. I have
123 the impression that the Portsmouth Savings Bank has some also. I sent the last named a N. Y. Tribune to-day. If they write us we will advise you.

"Upon a full conference of the N. Y. directors, and on examination and consideration of the agreement respecting the Boston office, it is decided that in making up the 'earnings' of the Boston office the 'accrued interest' on bonds held at your office for sale is not any portion of the 'profits' of the Boston office, as the same would accrue as well if they were retained here, but all transactions leaving profits to the Co. by doing the same should be counted. This, I

think, is both the letter and spirit as well as the 'theory' established by the Co.

"The hotels at Manhattan and Brighton beaches are not yet in operation for the season, but will doubtless be in a few days, and as soon as that is the case we would like to have some of your folks go over the line and see for yourselves.

"I think it would result in the placing of a million of the bonds in Boston. I do not see why that would not make the Boston office 'comfortable,' and at the same time 'pile up' our dividends.

"Very truly yours, &c., "—— ——."

124 It appeared from the accounts of the Boston office, rendered to the defendant and not objected to by it, that the plaintiff had sold other Western bonds, the — of which the defendant corporation had undertaken by contracts made with Western municipalities, and there had been allowed commissions on the same as a credit to the Boston office under his contract.

The contract of the plaintiff with the defendant of 17th December, 1879, was many times referred to by the several officers of the defendant corporation in letters to and conversations with the plaintiff during the year of the continuance of the contract and afterwards, and the rights of the plaintiff thereunder were several times discussed between the plaintiff and the defendant's officers, both in private interviews and at the formal meeting of the directors on the 6th day of August, 1880, previously referred to, at which meeting one of the lawyers employed by the defendant in New York was present and took part in a portion of the discussion, but no claim was ever made to the plaintiff that the contract was invalid or illegal, or that the plaintiff could earn nothing whatever under it until the commencement of this suit.

At the close of the plaintiff's evidence, by way of demurrer thereto, the defendant asked the court to instruct the jury to render a
125 verdict for the defendant, and thereupon the presiding judge ruled and instructed as hereinafter stated, and, subject to the plaintiff's exceptions thereto, refused to allow the plaintiff to go to the jury upon any of the counts of his declaration upon the contract in writing, or upon his count for a *quantum meruit* upon the account annexed, and ordered the jury to return a verdict for the defendant, which was done.

The court ruled as follows:

NELSON, J. (orally):

I have taken the question that was argued yesterday into consideration, and I am now ready to announce my ruling.

The contract upon which the plaintiff's case is founded provides that the plaintiff was to be chosen one of the directors of the defendant corporation. It had in contemplation by its express terms that he was to be invested with the duty of superintending and directing its affairs as one of its directors, and was to have that relation to the company and its stockholders while he was performing his part of the contract. The contract must therefore be construed in the same

manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director.

A director of a corporation is not absolutely prohibited by law from entering into a contract with the corporation through his co-directors. Whether such a contract is binding upon the corporation must depend upon its terms and the circumstances under which it was made. Owing to the peculiar relation which the directors owe to the corporation, being strictly trustees, and their position being in every sense fiduciary, their contracts with the corporation should be scanned, if not with suspicion, at least with the most scrupulous care. The validity of such a contract must therefore depend upon the nature and terms of the contract itself and the circumstances under which it is made.

The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it.

In entering into this contract, I perceive no evidence in the case from which to infer that either the plaintiff or the board of directors had any purpose to perpetrate a fraud on the corporation, or to grant to the plaintiff any undue privileges; but still, if that was the effect of the contract, it cannot be maintained.

In passing upon the question whether the directors had authority to make this contract, I must assume its true construction to be what the plaintiff claims it is, and to embrace commissions to the amount which the contract itself provides upon the contract upon which the Burlington railroad was sold to the Atchison company. Now,
126 it seems to me, in examining this contract, that there is very strong reason to conclude that the parties never had in contemplation the meaning which the plaintiff now contends should be given to it.

It seems to me that the contract was intended by the parties to relate to a different class of transactions from that which is set forth in the declaration as the breach of the contract upon which the plaintiff relies to maintain his action. They established by this contract a division comprising four of the New England States, with an office in Boston, and placed the plaintiff at the head of the Boston office, intending to give to him the business originating and transacted within the four States.

Now it appears that the business which culminated in the sale of the railroad to the Atchison company was a business which had originally come to the New York office. All plaintiff did after the business had come to the New York office was this: He introduced the company to an agent of the Atchison railroad who resided in Boston. He made no contract between the investment company and the Atchison road for the sale of the Burlington road. His sole services in respect to the business consisted of his conversation with Mr. Thorndike, his interviews with Mr. Coolidge, the president of the Atchison road, and in making arrangements for a meeting be-

tween the directors of the company in New York and the agents of the Atchison road in Boston.

The contract itself was made and concluded, its terms settled, and the contract perfected by the New York directors, and not by the plaintiff. The plaintiff's claim here rests upon the assumption that the contract provided that he was entitled to his one-third of the gross profits resulting to the company upon this business as his compensation for his services rendered in this particular instance; and although I have grave doubts whether that was a result which the parties intended, and was embraced within the meaning of this contract, yet I am bound, in construing the contract as the case now stands, and upon upon the evidence now before the court, to assume that this particular business was within the terms of the contract.

If this contract is to be construed as granting to the plaintiff the enormous commission which he claims in this suit, one-third the gross profits of the company arising out of this transaction, without regard to the debts or the other liabilities of the company, I am of the opinion that it is a contract which the directors had no authority whatever to make with the plaintiff. The service which he actually performed seems to be simply that of a broker introducing a customer to his employer, through whom a contract was subsequently perfected. If the contract is to be construed so as to cover a transaction of that kind, it was one that was unreasonable as affecting injuriously the rights of the stockholders of the company, and giving one of the directors of the company a right, without regard to the rights of creditors, to say nothing of the rights of the stockholders, in the assets of the corporation, giving him a profit without regard to the liabilities; and being of this nature, it was not a reasonable and fair contract for one of the directors of this corporation to make with his codirectors.

It might be very well claimed, if this contract related merely to a commission on sales actually effected through the Boston office by the plaintiff, or actually originated and perfected within the
127 four New England States embraced by the contract, that it would not be an unreasonable one, provided the results of it were reasonable, not affecting the general prosperity and solvency of the corporation. But if it is to be construed as covering transactions of this nature, where the enormous profit realized in this case would be divided in the proportion of two-thirds to the corporation and one-third to the director, it seems to me to be unreasonable, and a contract that ought not to be sustained.

The services rendered by the plaintiff in this case were exceedingly slight. He met his friend, Mr. Thorndike, and called his attention to the road which the investment company had in its possession for sale. He subsequently communicated the result of these interviews to the directors of the investment company in New York, the result of which was that, subsequently, through the action of the New York directors alone, this road was sold to the Atchison company, at a profit of something over $100,000. To hold that a director could make a contract with his codirectors by which the gross profits on a transaction of that kind and all transactions of a

like nature should be divided in the proportion in which it is claimed that this contract provides for seems to me would be unreasonable, and ought not to be sustained.

In regard to the claim of the plaintiff on the count on an account annexed, I am also of opinion that there is no evidence in the case upon which this count can be sustained. Mr. Hubbard very fairly states that what he did was done under the contract. This count is for commissions on this particular transaction. Mr. Hubbard was not a broker; he does not claim to have acted in any sense as a broker between the parties, under any contract that he was to receive a commission for his services; and to hold that for the services which he rendered in this case he is entitled to recover any compensation, under the circumstances, seems to me to be altogether out of the question. He was not a broker; there was no express contract, and there are no circumstances from which it can be concluded that any kind of an implied contract existed between the investment company and the plaintiff by which he was to have a commission on this transaction.

I am of the opinion that the defendant is entitled to a verdict.

Mr. SMITH: Your honor understands, of course, that we shall go up on that.

NELSON, J.: I understand that the plaintiff excepts to this ruling, and the exception will be allowed.

128 To which rulings, instructions, and refusal to rule the plaintiff then and there excepted.

And inasmuch as the matters referred to, and the several requests, instructions, rulings, and directions of the honorable court so excepted to do not appear by the record on the verdict aforesaid, the counsel of the plaintiff prays this honorable court to set their seal to and to allow this bill of exceptions, containing the several matters proved and given in evidence, and the prayer, requests, instructions, rulings, and directions of his honor, the judge, thereupon, and the exceptions thereto.

All the material evidence bearing upon the rulings excepted to is stated in the bill.

All which being found to be true are allowed, and ordered to be filed as of the fifteenth day of November, A. D. 1882, before the jury left the bar.

In witness whereof I hereunto set my hand.

THOMAS L. NELSON,
U. S. District Judge.

129 ANNEX "A."

Charter of Defendant.

An act to incorporate the Edgar County Land and Loan Company.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that James A. Eads and Calvin W. Levings, their associates, heirs, and assigns, and all such

persons as shall become stockholders in the corporation hereby created, and their successors, shall be a body politic and corporate by the name and style of "The Edgar County Land and Loan Company," shall have a common seal, may sue and be sued, make contracts, and have and exercise all the powers and privileges and be subject to all the liabilities of a body corporate and politic, and shall be located at—— .

SECTION 2. The capital stock of said company shall be one hundred thousand dollars, and shall be subscribed and paid for in the manner prescribed by the by-laws. It shall be divided into shares of one hundred dollars each, to be deemed personal property and transferrable as such on the books of the company in such manner as the by-laws may prescribe. The capital stock may be increased from time to time to an amount not exceeding two hundred
130 thousand dollars; each share of stock shall entitle the holder thereof to one vote, for the purpose of increasing the capital stock.

SECTION 3. The said corporation shall have power to borrow money and to receive money in deposit and pay interest thereon, and to loan money within or without this State at any rate of interest not exceeding that now or hereafter allowed by law to private individuals, and to discount loans, and in computation of time thirty days shall be a month and twelve months a year, and to make such loan payable either within or without this State, and to take such securities therefor, real and personal, or both, as the directors and managers of said corporation shall deem sufficient, and may secure the payment of such loans by deeds of trust, mortgages, or other securities either within or without this State; may buy and sell negotiable paper or other securities; may open and establish a real estate agency; may purchase and sell real estate, and shall have power to convey the same in any mode prescribed by the by-laws of such corporation; may accept and execute all such trusts, whether fiduciary or otherwise, as shall or may be committed to it by any person or persons, or by order of any court or tribunal or legally constituted authority of the State of Illinois or of the United States
131 or elsewhere; may make such special regulations in reference to trust funds or deposits left for accumulation or safe keeping as shall be agreed upon with the depositors or parties interested for the purpose of accumulating or increasing the same; may issue letters of credit and other commercial obligations, not, however, to circulate as money, and may secure the payment of any loan made to said company in any way the directors may prescribe.

SECTION 4. Married women and minors may in their own names subscribe for stock and deposit money with said corporation, and receive certificates of stock and deposit in their own names, which stock and deposits shall be subject to their order and disposal only.

SECTION 5. It may be lawful for the company to purchase and hold such real estate as may be convenient and useful for the transaction of its business, and also to take and hold any real estate in

trust or otherwise, for or in payment of loans and debts due to said company; to bid for and purchase real estate at any sale, whether made in virtue or on account of any loan or mortgage or trust made to or held by or for said company, or in which it is interested or otherwise, and to receive the satisfaction of any loan or debt,
132 any real or personal estate, and to hold, use, lease, and convey the same.

SECTION 6. The affairs of the company shall be managed by a board of directors, at least three in number, who shall hold their office for one year, and until their successors are elected and qualified. The directors shall have power to appoint other officers and agents, and prescribe their duties, and they may fill vacancies that may occur in the board of directors. The directors shall have power and authority to make by-laws, rules, and regulations for the government and well-ordering of the business affairs and offices of said company. They shall have the right and power to determine the time and manner in which instalments upon capital stock shall be paid, and may declare forfeited any share or shares of stock on which remains due and unpaid any such instalment for the period of thirty days, together with all sums paid thereon, or at their option may sue for and recover the entire amount of subscription remaining unpaid.

SECTION 7. The stockholders herein shall be responsible in their individual property in double the amount of their stock to make good all losses to depositors or others, and no assignment of their stock shall release them from said liabilities until after the fact of
133 such assignment and name of the person to whom made, and the amount of said stock shall have been advertised in some public newspaper printed in the country where this corporation is doing business, and located for the period of three months.

SECTION 8. This act shall be void unless said company shall organize and proceed to business within two years after the passage hereof.

The said company shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust, or deposit companies.

SECTION 9. This act shall be deemed and taken to be a public act, and be in force from and after its passage.

Approved March 8th, 1867.

NOTE.—It appeared in evidence that the name of the defendant company was changed on the 10th August, 1878, from "The Edgar County Land and Loan Company" to "The New York, New Engtand and Western Investment Company."

134 ANNEX "B."

First-Mortgage Bonds of the Kansas City, Burlington and Santa Fé Railway Co.

Circular.

Office of the New York, New England and Western Investment Company, 31 and 33 Pine Street.

NEW YORK, *May* 15, 1880.

Subscriptions are invited by the New York, New England and Western Investment Company, financial agent for the first-mortgage bonds of the Kansas City, Burlington and Santa Fé Railway Company, to the amount of $2,500.000.

These bonds are secured by a first mortgage on all the property, rights, and franchises of said railway company made to the Farmers' Loan and Trust Company of the City of New York, and have thirty years to run, bearing interest at seven per cent. per annum, payable semi-annually, in the city of New York, and are of the denomination of $1,000 each. They are issued for the purpose of extending the line from Burlington to Wichita and from Ottawa to Kansas City, and are limited to $15,000 per mile of road completed and equipped. A sinking fund of two per cent. of the gross earnings of the road each year is established, payments on that account beginning July 1st, 1885, to be applied to the redemption of the bonds.

A part of the subscription is to become payable until
135 $1,500,000 of the bonds shall have been subscribed for and a syndicate thereby formed, the object being to secure sufficient funds to complete the line at least from Burlington to Wichita during the current year and thus insure a sufficient length of line to make it self-sustaining locally, and if it shall be found necessary, in order to secure proper alliances with one or more of the trunk lines eastward, to also build from Ottawa to Kansas City or Leavenworth. It is believed that when the line shall be open from Burlington to Wichita the net earnings of the company will be largely in excess of the interest upon the bonds issued on the line from Ottawa to Wichita, and this opinion is fully warranted by the present earnings of that portion of the line between Ottawa and Burlington, forty-five miles, which is now being operated under every conceivable disadvantage. This is the shortest practicable line between Kansas City and Wichita and is almost a perfect air line from Kansas City to Santa Fé and the great mining regions of New Mexico and Arizona. It traverses the richest portion of the great State of Kansas, including the wonderful wheat and corn belt and the Williamsburgh coal field, and the counties along the line are not only already well settled, but are increasing in population at a mar-
136 velous rate, thus insuring a self-sustaining local business to the road from the beginning, independent of the through traffic, which will necessarily be very large.

The proceeds of sales of these bonds are all to be deposited with the Farmers' Loan and Trust Company of this city, in trust, and to

be paid out on account of construction, only in accordance with the authority of the board of directors of the company, and on the certificates of the chief engineer. Under the terms of the agreement between the railway company and the investment company, the bondholders are to have a majority of the board of directors until the completion of the road to Wichita, and every business precaution has been taken to insure the proper expenditure of the fund.

The price fixed upon the bonds to members of the syndicate is 90 and accrued interest, and each member will receive 40 per cent. of the amount of bonds so subscribed for by him in full-paid capital stock of the railway company, the shares being $100 each.

As soon as $1,500,000 of subscriptions shall be received (if it shall be prior to June 15, 1880) notice of the fact and instructions as to remittances and payments will be given to the subscribers by mail, and the first installment on account of said bonds will become payable within ten days after the deposit of the notice in the
137 mails, and the remainder in five equal monthly payments thereafter, the first installment being 40 per cent. Interest at 7 per cent. per annum will be allowed on each installment on final settlement and payment. Certificates of deposit and rights will be issued by the Farmers' Loan and Trust Company to each subscriber as payments are made, and on the final payment the stock due in each case will be issued and delivered.

Subscriptions will be received until 12 o'clock noon, June 15, 1880 (unless the required amount shall be sooner subscribed), and the first installment will become due and payable within ten days thereafter.

Each subscriber may anticipate the latter installments, and all subscriptions which may be paid in full at the maturity of the first installment will entitle the subscriber to a rebate of three per centum on the face value of the bonds paid for. Subscriptions will be received in any amount in even thousands, and may be inclosed or delivered to said investment company, at its offices, 31 and 33 Pine St., New York, or 19 Congress St., Boston.

JOHN C. SHORT, *Pres.*

138 *Form of Subscription.*

To the New York, New England and Western Investment Company, 31 and 33 Pine street.

NEW YORK, —— —, 1880.

Referring to and accepting the terms, conditions, and provisions of the foregoing attached circular issued by your company as the financial agent of the Kansas City, Burlington and Santa Fé Railway Company, of the State of Kansas, — do hereby subscribe for first-mortgage bonds of said railway company to the amount of —— thousand dollars ($——), and do hereby agree to take and pay for the same, or for such smaller amount as may be allotted to ——, at the price and on the terms and conditions specified in said circular.

Name. —— ——,
Address. ——.

139 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Lucius L. Hubbard *v.* The New York, New England and Western Investment Company, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this first day of September, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

140 *Bond on Writ of Error.*

Know all men by these presents that we, Lucius L. Hubbard, of Cambridge, in the county of Middlesex and Commonwealth of Massachusetts, as principal, and Benjamin A. G. Fuller, of Boston, and Francis D. Cobb, of Barnstable, both of said Commonwealth, as sureties, are held and firmly bound unto the New York, New England and Western Investment Company, a corporation established under the laws of the State of Illinois, in the full and just sum of eight hundred dollars, to be paid to the said New York, New England and Western Investment Company, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the fourteenth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas, lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said Lucius L. Hubbard, plaintiff, and the said New York, New England and Western Investment Company, defendant, judgment was rendered against the plaintiff, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

LUCIUS L. HUBBARD. [L. S.]
BENJ. A. G. FULLER. [L. S.]
F. D. COBB. [L. S.]

Signed, sealed, and delivered in presence of—

——— ———.

Approved. THOMAS L. NELSON,
U. S. Dist. Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Massachusetts C. C. U. S. No. 357. Lucius L. Hubbard, plaintiff in error, *vs.* The New York, New England and Western Investment Company. Filed 8th October, 1883.

119-695

SUPREME COURT OF THE UNITED STATES.

No. 103. OCTOBER TERM, 1886.

LUCIUS L. HUBBARD, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL.

Judgment having been rendered for the defendant in this action in the Circuit Court of the United States for the District of Massachusetts, as appears by the transcript of the record and the proceedings in said Circuit Court, returned to this Court with the writ of error in this case, the plaintiff in error prays that the judgment aforesaid may be reversed, for manifest error therein; and for reasons therefor makes the following assignment of errors.

The plaintiff in error avers that the learned Judge erred:

References to page and line of printed record.

FIRST. In that he refused to allow the plaintiff in error (being the plaintiff below) to go to the jury on any of the counts of his declaration, ruling:

"I am of the opinion that the defendant is entitled to a verdict." p. 58, l. 19

SECOND. In that he held that the contract in writing, dated the 17th of December, 1879, was unauthorized, illegal, invalid and void; ruling:

"If this contract is to be construed as granting to the plaintiff the enormous commission which he claims

in this suit, one-third the gross profits of the company arising out of this transaction, without regard to the debts or the other liabilities of the company, I am of the opinion that it is a contract which the directors had no authority whatever to make with the plaintiff. The service which he actually performed seems to be simply that of a broker introducing a customer to his employer, through whom a contract was subsequently perfected. If the contract is to be construed so as to cover a transaction of that kind, it was one that was unreasonable as affecting injuriously the rights of the stockholders of the company, and giving one of the directors of the company a right, without regard to the rights of creditors, to say nothing of the rights of the stockholders, in the assets of the corporation, giving him a profit without regard to the liabilities; and being of this nature, it was not a reasonable and fair contract for one of the directors of this corporation to make with his co-directors. * * * * * p. 57, ll. 14–30

If it is to be construed as covering transactions of this nature, where the enormous profit realized in this case would be divided in the proportion of two-thirds to the corporation and one-third to the director, it seems to me to be unreasonable, and a contract that ought not to be sustained. * * * * * p. 57, ll. 37–41

To hold that a director could make a contract with his co-directors by which the gross profits on a transaction of that kind and all transactions of a like nature should be divided in the proportion in which it is claimed that this contract provides for seems to me would be unreasonable, and ought not to be sustained. * * * p. 57. ll. 49–51 p. 58, ll. 1–3

There was no express contract." p 58, ll. 14–15

THIRD. In that he ruled:

"The contract upon which the plaintiff's case is founded provides that the plaintiff was to be chosen one of the directors of the defendant corporation. It had in contemplation by its express terms that he was to be invested with the duty of superintending p. 55, ll. 43–49

and directing its affairs as one of its directors, and was to have that relation to the company and its stockholders while he was performing his part of the contract. The contract must therefore be construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director." p. 56, ll. 1–2

FOURTH. In that he ruled:

"There are no circumstances from which it can be concluded that any kind of an implied contract existed between the investment company and the plaintiff by which he was to have a commission on this transaction." p. 58, ll. 15–18

FIFTH. In that he ruled:

"In regard to the claim of the plaintiff on the count on an account annexed, I am also of opinion that there is no evidence in the case upon which this count can be sustained." p. 58, ll. 4–6

SIXTH. In that he ruled:

"It seems to me that the contract was intended by the parties to relate to a different class of transactions from that which is set forth in the declaration as the breach of the contract upon which the plaintiff relies to maintain his action." p. 56, ll. 33–36

SEVENTH. In that he ruled:

"They established by this contract a division comprising four of the New England States, with an office in Boston, and placed the plaintiff at the head of the Boston office, intending to give to him the business originating and transacted within the four States. Now it appears that the business which culminated in the sale of the railroad to the Atchison company was a business which had originally come to the New York office." p. 56, ll. 36–43

EIGHTH. In that he ruled:

"Mr. Hubbard was not a broker; he does not claim to have acted in any sense as a broker between the parties, under any contract that he was to receive a commission for his services; and to hold that for the services which he rendered in this case he is entitled to recover any compensation, under the circumstances, seems to me to be altogether out of the question. He was not a broker." p. 58, ll. 8–14

BY HIS ATTORNEYS,
ROBERT DICKSON SMITH,
WILLIAM WARREN VAUGHAN.

ROBERT DICKSON SMITH,
WILLIAM WARREN VAUGHAN,
OF COUNSEL.

119-696

Supreme Court of the United States.

October Term, 1886.

No. 103.

Lucius L. Hubbard, Plaintiff in Error,

vs.

The New York, New England and Western Investment Company.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Plaintiff in Error.

BOSTON:
GEO. E. CROSBY & CO., LAW PRINTERS, 383 WASHINGTON STREET.
1886.

Supreme Court of the United States.

October Term, 1886.

No. 103.

Lucius L. Hubbard, Plaintiff in Error,

vs.

The New York, New England and Western Investment Company.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Plaintiff in Error.

THE FACTS.

References to page and line of Printed Record.

At the time of the transactions concerning which this suit is brought the plaintiff was a resident of Massachusetts, practising law in Boston. The defendant was a corporation chartered and organized under the laws of the State of Illinois, but having its usual place of business at its office in the city of New York. — p. 1, l. 9; p. 21, l. 45; p. 22, l. 1; p. 22, ll. 14–15

The charter of the corporation empowers it to "buy and sell negotiable . . securities," to "purchase and sell real estate" and to "accept and execute all such trusts . . . as shall be committed to it." This charter also provides that "the affairs of the company shall be managed by a board of directors . . . who . . . shall have power and authority to make . . . . regulations for the government . . . of the business affairs . . . . of said company." The by-laws of the company authorized the directors to hold meetings in New — p. 59, ll. 28–29; p. 59, l. 30; p. 59, ll. 32–33; p. 60, ll. 8–9; p. 60, ll. 13–16; p. 34, ll. 31–33

References to page and line of Printed Record.

York, and made a majority of the board a quorum for the transaction of business. The actual business transacted by the company consisted chiefly in placing municipal and county bonds upon the market, and in negotiating the sale of railroads and their securities. p. 34, ll. 29–30 p. 22, ll. 28–30 Correspondence, passim.

The capital stock of the company was fixed at the nominal sum of $200,000, but $82,000 of this had never been subscribed for or issued. Of the whole actual stock of $118,000, $112,000 had been devoted to the expenses of procuring the charter and the purchase from Messrs. Short, Debevoise and Watson of the "good-will, contracts, interests and business" previously owned and carried on by them, which were turned in to the company. On the 17th of December, 1879, the date of the execution of the contract upon which the plaintiff declares in five of the counts of his declaration, Messrs. Short, Debevoise and Watson held 89 per centum of the stock issued, the remaining 11 per centum being held by six other persons. Messrs. Short, Debevoise and Watson also formed three of the company's board of five directors, Mr. Short being President, Mr. Debevoise, Vice-President, and Mr. Watson, Secretary and Treasurer. p. 32, l. 17 p. 32, l. 16 p. 31, ll. 40–42 p. 32, l. 15 p. 31, l. 37 p. 31, ll. 37–39 p. 12, p. 7, p. 8, p. 14 p. 32, ll. 6–8 p. 32, ll. 9–14 p. 28, ll. 25–26, p. 33, ll. 2–3 p. 34, l. 46, p. 35, l. 1 p. 28, l. 23 p. 28, l. 25 p. 28, l. 24

In August, 1878, it had been duly voted at a stockholders' meeting to establish a branch office in Boston; and some months later the President was formally authorized to open a branch office in that city "at such time as in his discretion shall seem desirable." p. 22, ll. 4–5 p. 22, ll. 7–8 p. 22, ll. 10–11 p. 22, ll. 17–21 p. 22, ll. 21–23

In October, 1878, Mr. Short called on the plaintiff at Boston and presented to him a letter of introduction.

He stated to the plaintiff that he was "at the

References to page and line of Printed Record.

head of an investment company . . . which proposed to place loans, reorganize railroads and do a general investment business." He farther said to the plaintiff that "the general principle upon which his company acted was to divide the commission which they might receive on any business into three parts: one part went into the company's treasury; . . . the second went to the person at the west, in case of farm mortgages or other securities procured there, as commission for doing the business at that end; *the third part would go to such parties as might bring customers to the company at this end — the Eastern end.*" He added that "by dividing up their commissions into three parts, . . . they would encourage people, by offering this liberal commission, to make business for the company . . . and he thought that in the end the earnings of the company would be very much more considerable under that policy than if the company sought to retain a larger share of the commissions for themselves." He desired the plaintiff to bring any business to the company and *offered to give him one-third of the gross commissions on all business which he might bring to it.* The plaintiff said that he would try to get business for the company, and did in fact soon afterward perform various acts with a view to bringing in business. A few days after this, in reply to a letter from the plaintiff making more detailed inquiries as to the services for which he would be entitled to commissions, Mr. Short wrote to him under date 19th November, 1878: "You will be entitled to commissions *on all business done by us for each person or corporation* for whom we shall make investments and *whom you may bring to us*, whether on first or subsequent dealings."

p. 22, ll. 25–30

p. 22, ll. 36–44

p. 22, ll. 45–51

p. 23, ll. 1–3, p. 24, ll. 10–11 p. 23, ll. 7–9, p. 24, ll. 12–14 p. 23, l. 13, p. 24, ll. 19–20 p. 24, ll. 26–29

p. 24, ll. 47–50

References to page and line of Printed Record

This offer was never withdrawn, nor were its terms ever changed or modified, save that Mr. Short, acting on behalf of the company, added to this offer several terms requesting the plaintiff to himself open and take charge of the Boston office. But during all the negotiations concerning the proposed Boston office, which lasted till the making of the contract now in question, the terms which requested the plaintiff to bring in business to the company and offered him one-third of the gross profits, or commissions, on all business brought in by him were constantly renewed, and the same terms of compensation were finally embodied in the written memorandum which was made between the plaintiff and defendant upon which the plaintiff declares in the counts previously mentioned.

p. 23, ll. 37–41
p. 24, l. 30,
p. 24, l. 34
p. 24, ll. 32–34
p. 24, l. 37
Exhibit "A,"
p.10, l. 18 et seq.
p. 29, l. 10

At some time subsequent to these earlier proposals made to the plaintiff to act as agent, Mr. Short desired him to "place or buy" some stock of the company. The first reference to this proposition by the defendant that the plaintiff should invest in the company some of his own or his friends' money appears about seven months after the opening of the negotiations for the agency. The plaintiff objected to this proposal, and declined certain offers for the agency conditioned upon it. Toward the end of the negotiations, however, a proposal was made that he be elected a director of the company. From whom the proposal came does not appear, but the first mention of it is in a letter from Mr. Short of 11th November, 1879, and a few weeks after this the plaintiff agreed to take or place a certain amount of stock, and the defendant agreed to elect him a director; and these terms were also embodied in the written memorandum, as well as those touching the agency.

p.26, l.39
p.25, l.21
p.27, ll.1-6
p.27, l.16
p.27, ll.16-45

STATEMENT OF FACTS.

References to page and line of Printed Record.

The terms of this memorandum were discussed, p. 29, ll. 42–49
one by one, and agreed upon by the plaintiff, on p. 30, ll. 4–7
one side, and Messrs. Short, Debevoise and Wat- p. 31, l. 1
son, officers and directors of the company, on the p. 29, ll. 6–7
other, at a meeting held at the company's office p. 28, ll. 20–25
in New York on the 17th of December, 1879. p. 31, l. 4
These terms were then and there put into writing p. 29, l. 13
by the plaintiff at Mr. Short's request, and revised p. 29, ll. 23–26
and corrected by Mr. Short, and, after a further p. 29, ll. 15–16
private consultation of the officers of the compa- p. 29, ll. 27-34
ny, the memorandum thus made was, at the same p. 31, ll. 20–23
meeting, signed by the plaintiff and executed by p. 29, ll. 30-32,
Mr. Short in the name of the defendant company. p. 31, l. 24
At a directors' meeting held ten days later, at which p. 11, ll. 44-46
Messrs. Short, Debevoise and Watson, as three of p. 33, ll. 26-34
the directors, were present, with others, this action
was formally ratified by a vote of the directors.

The plaintiff was not present at this meeting.

This instrument recites that the plaintiff is to p, 10, ll. 26–28
open and take charge of the "*Boston office, desig-* p. 10, l. 44.
nated as the Eastern Division . . . which p. 11, ll. 5–7
shall include the whole of Maine, New Hampshire,
Vermont and Massachusetts," and provides that p. 11, ll. 1–18
as salary or compensation for his services the
plaintiff shall receive "one-third of all the gross p. 11, l. 13
profits earned and received by the company, on p. 11, ll. 16–17
all business *originating in said Eastern Division* p. 11, l. 5
. . . or transacted at said Boston office," this p. 11, l. 7
third being, in effect, guaranteed to be not less p. 11, l. 2
than $1,800 a year by means of a provision for the p. 11, ll. 10–13
payment of that sum in any event. It also pro-
vides that the company shall "favor as much as p. 11, ll. 20–22
practicable said Boston office to the end that par-
ties within its precincts may deal directly with it,"
and that "the fullest information shall be fur- p. 11, l. 28
nished" to the plaintiff. The memorandum also
requires, that the plaintiff, before the contract can p. 11, l. 34

References to page and line of Printed Record.

go into effect, shall either purchase himself or procure to be sold to others $10,000 of the capital stock of the company, and provides that he shall be elected a director. p. 10, ll. 41–42 p. 11, ll. 34–37

The plaintiff complied with the stipulation concerning the purchase of stock by buying the required amount himself, but he did not become a director of the company until after the inception of the transactions out of which the claim now in suit arises. p. 33, l. 48–50 p. 34, l. 1 p. 34, ll. 40–41 p. 34, l. 46, p. 35, ll. 1–2

He did indeed receive a written notice stating that at a meeting of the directors, held on 27th December, 1879, he had been "elected a director to fill one of the existing vacancies;" but it appeared in evidence at the trial that there was then no vacancy, and that the directors had no power to create a director where no vacancy existed. p. 34, l. 42 p. 34, ll. 44–45 p. 34, l. 40 p. 35, l. 1 p. 60, ll. 12–13 "Section 6"

On the 5th of June, 1880, at about the time of the close of the services for which the plaintiff now sues, he was actually elected a director of the company at a regular meeting of the stockholders. p. 34, ll. 3–4

In pursuance of this agreement the plaintiff opened and took charge of an office for the defendant in Boston, and began to obtain business for the company, and to sell the bonds and other property held by it for sale. p. 33, ll, 45–49 pp. 53–55

Among the business done by him for the company he from time to time negotiated the sale of sundry bonds. The contracts for the sale of these bonds had been secured by the company from western municipalities under arrangements made at the west, with the making of which the plaintiff had nothing to do. He was, however, credited with commissions in all cases p. 54, ll. 28–30 p. 55, ll. 11–13 p. 54, l. 26, p. 55, ll. 13–14 p. 54, ll. 27–28 p. 55, ll. 15–16

References to page and line of Printed Record.

upon these sales as being business "transacted at the Boston office or originating in the Eastern Division." Some question having arisen between the parties on one occasion as to the meaning of this phrase, the president of the defendant company wrote to the plaintiff upon this subject under date of 11th February, 1880, as follows: p. 54, ll. 19–24 p. 54, l. 37

"Upon a full conference of the New York directors, and an examination and consideration of the agreement respecting the Boston office, it is decided that in making up the earnings of the Boston office the accrued interest on bonds held at your office for sale is not any portion of the 'profits' of the Boston office, as the same would accrue as well if they were retained here, but *all transactions leaving profits to the Co. by doing the same should be counted.* This, I think, is both the letter and spirit as well as the 'theory' established by the company." . . . . . p. 54, ll. 41–47 p. 54, l. 47 p. 55, ll. 1–2

Also, on 10th May, 1880, "At Manhattan and Brighton beaches . . . we would like to have some of your folks go over the line and see for yourselves. I think it would result in the placing of a million of the bonds in Boston. *I do not see why that would not make the Boston office 'comfortable'* and at the same time 'pile up' our dividends." p. 55, ll. 3–9 p. 55, ll. 8–9

Among these contracts made by the Investment Company with western corporations was one with the Kansas City, Burlington and Santa Fe Railway Company, under which the Investment Company acquired the exclusive right to sell certain bonds and a majority of the stock of that railroad company, on terms which would secure a large profit to the Investment Company. p. 36, ll. 30–34 p. 43, ll. 10–11

STATEMENT OF FACTS.

References to page and line of Printed Record.

The track of the Kansas City, Burlington and Santa Fe Railway Company was already completed from Ottawa westward as far as Burlington, Kansas, a distance of forty-five miles. The bonds offered by the Investment Company were to be sold for the purpose of extending the line westward from Burlington, and were to be secured by a mortgage covering both the completed portion of the road and the new line which it was proposed to build. There was however an underlying mortgage already existing upon these forty-five miles of completed road given to secure an earlier issue of 600 $1000 bonds. These prior $600,000 bonds it was proposed to take up and cancel with a portion of the proceeds of the bonds offered by the defendant for sale. Nearly the whole of these $600,000 bonds were then held by pledgees for value, but they afterwards came under the control of the defendant by a contract between it and Mr. Schofield, the President of the Kansas City, Topeka and Santa Fe Railway Company, made after the beginning of the transactions which are narrated below and out of which the plaintiff's claim arises.

p. 36, ll. 39–40
p. 61, ll. 17–18
p. 36, ll. 38–40
p. 36, ll. 40–42
p. 36, ll. 43–44
p. 48, ll. 8–12
p. 40, ll. 39–40
p. 39, l. 25

On the 14th May, 1880, advance copies of a circular issued by the Investment Company were sent by post from the defendant's office in New York to the plaintiff at Boston for distribution. These circulars were dated 15th May, 1880, the day on which they would arrive at Boston in due course of post. They recited the projected extension of the line and invited subscriptions to the proposed new issue of bonds described above at 90 and accrued interest, but made no mention of the underlying $600,000 bonds.

On the 23d of May the plaintiff learned that

p. 36, ll. 45–46
p. 61, l. 7
p. 61, ll. 17–46
p. 61, ll. 8–10
p. 62, ll. 8–9
pp. 61–62
p. 36, l. 48

STATEMENT OF FACTS.

References to page and line of Printed Record.

Mr. S. Lothrop Thorndike, the comptroller of the Atchison, Topeka and Santa Fe Railroad Company, had that day returned from Santa Fe and the west. p. 36, l. 49 p. 37, l. 4

The Atchison, Topeka and Santa Fe Railroad Company was a corporation organized under the laws of Kansas, but having its President's, Comptroller's and other principal business offices in Boston. A portion of its line in Kansas was situated close to the line of the Kansas City, Burlington and Santa Fe Railway Company, and upon learning the return of Mr. Thorndike, the plaintiff called upon him at his house and informed him that it was intended to build the Kansas City, Burlington and Santa Fe westward of its present terminus, and possibly to also extend it eastward to Kansas City. A road so built would be approximately parallel to the Atchison, Topeka and Santa Fe, and the plaintiff asked Mr. Thorndike if his road had taken action with reference to the Kansas City, Burlington and Santa Fe, or any steps to "get it out of the way." Mr. Thorndike replied that nothing had been done about this road, and that at the meeting just held in the west no special mention had been made of it. The plaintiff *informed him that the control of the road was now in the hands of the Investment Company* and that this company was issuing circulars inviting subscriptions to these new bonds. Mr. Thorndike said he had not seen the circular and the plaintiff promised to send him one, and also gave him other information concerning the proposed line. p. 36, l. 50 p. 47, ll. 31–33 p. 37, l. 2 p. 42, l. 38 p. 37, l. 6 p. 37, ll. 14–15 p. 51, l. 5 p. 37, ll. 16–17 p. 37, ll. 21–22 p. 37, l. 20 p. 37, l. 22 p. 37, ll. 91–2 p. 37, ll. 12–13 p. 37, l. 25 p. 37, l. 24 p. 37, ll. 32–33

On Monday, the 24th of May, the day following the first interview, Mr. Thorndike came to the office of the Investment Company, stating that he had not received the promised circular, and p. 37, ll. 27–28 p. 37, l. 30 p. 37, l. 32

References to page and line of Printed Record.

obtained one from the plaintiff. He also asked a number of questions about the road and the plaintiff gave him substantially the same information as at the previous interview. He also asked "where Mr. Schofield was," and was told he was at the New York office of the Investment Company. As he was leaving, the plaintiff said to him: "if the Investment Company *can sell this road* to your company will you buy it?" To which Mr. Thorndike made an indefinite reply.

p. 37, ll. 32–33

p. 37, l. 34

p. 37, ll. 41–42

On Tuesday, the 25th of May, the plaintiff reported this interview, by letter, to the president of the defendant company, and asked, "*If the A. T. & S. Fe will take us, can we sell to them?*"

pp. 37–38

p. 38, ll. 2–3

On Wednesday, the 26th of May, the day following, Mr. Short answered, by letter of that date, . . . "to reply to your question, 'if the A., T. & S. F. will take us, can we sell to them,' *Yes*, and if they are wise, they will. . . . . Mr. Thorndike couldn't do a better thing for the A., T. & S. F. than to have that company absorb us. *Suppose you see about it at once.*" . . . .

p. 38, ll. 28–30

p. 38, ll. 36–37

On Thursday, the 27th of May, the plaintiff, on receipt of the above letter, went to the office of the Atchison, Topeka and Santa Fe, and saw Mr. Thorndike, who took him into the office of Mr. Coolidge, the President of the road. The plaintiff produced his circular and asked Mr. Coolidge if he could "*open negotiations with him*" with reference to the Kansas City, Burlington and Santa Fe road. An interview of half an hour followed in the course of which Mr. Coolidge informed himself of the facts concerning the road and of the existence of the $600,000 prior bonds on the completed forty-five miles of road,

p. 47, ll. 27–28

p. 47, ll 32–33

p. 47, ll. 33-34

p. 47, ll. 35–36

p. 49, ll. 6–7

p. 47, l. 38

p. 47, ll. 42–44

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and said that he wanted to buy the *road itself*, p. 48, l. 22
and that "if they would only name a price" for p. 48, ll. 44–45
that "he would consider it." He requested the
plaintiff to telegraph or write Mr. Short in order p. 48, ll. 25–26
to find out for just how much the defendant com-
pany would let him have the road and the $600,- p. 39, ll. 8–10
000 bonds already issued, and to let him know p. 49, l. 1
the following day. The plaintiff reported this
interview at length to Mr. Short, repeating the pp. 38, 39
request for a telegraphic answer.

At this time the defendant had no authority to p. 41, ll. 16–17
sell the completed road outright, or the $600,000
bonds already issued upon it; but on the follow- p. 40, ll. 26–28
ing day, Friday, the 28th of May, the defendant
made a contract in New York with Mr. Scho- p. 40, ll. 38–39
field by which it acquired the right to sell these
forty-five miles of completed road and these out-
standing $600,000 bonds on terms which would
yield a large profit to the company; and upon that
day, after receipt of the plaintiff's letter, Mr.
Short telegraphed the plaintiff to "*keep C. & T.* p. 40, ll. 47–49
[*Coolidge and Thorndike*] *on the hooks for Scho-
field's* 45 *miles as last resort.*"

On receipt of this and a second telegram the
plaintiff had another interview with the president p. 49, ll. 8–9
of the Atchison Road, at which Mr. Coolidge defi- p. 41, ll. 13–14
nitely declined to buy the whole line from Kansas
City to Wichita, but said he would buy the p. 41, l. 14
forty-five miles of *completed road*. The plaintiff
then made him certain propositions and said to him p. 41, ll. 21–35
that if he desired Mr. Short to come to Boston the
plaintiff "would send for him." Mr. Coolidge, in p. 49, ll. 25–26
reply, said that he would consider some such p. 41, l. 35
propositions as those submitted by the plaintiff
and requested the plaintiff to have Mr. Short p. 49, ll. 7–8
come on to Boston to see him, saying that he
would "be very glad to see him *if he could sell* p. 49, ll. 34–35

References to page and line of Printed Record.

the railroad," but adding that "if he could not sell the railroad he did not care to see him." On the same day the plaintiff reported this interview by letter to the defendant, with his comments and suggestions. — p. 49, ll. 35–37; p. 41

On Saturday, the 29th of May, Mr. Short wrote to the plaintiff in reply, "The A., T. & S. Fe cannot afford to have Mr. Schofield's road pass to any other company and become a competitor at Wichita, and *Mr. Coolidge evidently intends to buy our road.* I . . . can go to Boston if it shall become necessary. We are masters of the situation." . . . — p. 42, ll. 36–39; p. 43, ll. 2–3

In the meantime Mr. Coolidge, after learning from the plaintiff on Monday, through Mr. Thorndike, that the Investment Company had charge of this matter and that Mr. Schofield was at their New York office, had caused his Boston brokers, acting through their New York house, to request Mr. Schofield, as President of the Kansas City, Burlington and Santa Fe Railroad Company, to come on to Boston with a view to the sale of his road. On Wednesday one Worden had appeared at the New York office and attempted to open negotiations for the purchase of the forty-five miles of completed road. Later in the week Worden attempted to induce Mr. Schofield to go to Boston, and on the following Friday Mr. Short wrote to the plaintiff that he had to "announce that the field of negotiation" had "evidently been *transferred* to New York." — p. 37, ll. 27–28; p. 37, ll. 9–10; p. 37, l. 35; p. 44, ll. 23–25; p. 39, ll. 33–34; p. 50, ll. 1–3; p. 39, ll. 37–38; p. 42, ll. 40–43; p. 39, l. 25; p. 40, ll. 14–15

Mr. Schofield however declined to treat directly with the Atchison Road, or to go to Boston, and informed Mr. Coolidge by letter that the whole matter was in the hands of the Investment Company, and that he would carry out any con- — p. 43, ll. 28–48; p. 43, ll. 42–45; p. 44, ll. 1–5

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tract which that company might make in relation to the disposition of the road; and on the following Monday, the 31st of May, Mr. Coolidge, in an interview held that day, told the plaintiff that he did not know Worden in the matter, and had not negotiated through him; that he had caused Mr. Schofield to be asked to come on because he thought him the man in authority, but that he now understood that the Investment Company had the entire matter in its hands; and after farther negotiations with the plaintiff, renewed his request to have Mr. Short come on to Boston. p. 49, ll. 37–38 p. 49, l. 42 p. 49, ll. 42–43 p. 44, ll. 23–24 p. 44, ll. 26–27 p. 49, ll. 45–46

This was the end of the attempt to negotiate in New York for the purchase of the railroad, and all farther negotiations, down to the time of their completion by the signing of the agreement of purchase and sale, took place in Boston. pp. 43–50 p. 50, ll. 32–34

On Monday, the 31st, the day of this last interview with Mr. Coolidge, the plaintiff repeated by letter the request to Mr. Short to come to Boston, describing the situation. p. 44

On Tuesday, the 1st of June, Mr. Short wrote to the plaintiff: "you may say to Mr. Coolidge that you wrote me the result of your interview of yesterday with him, and that in order that an understanding may be arrived at . . . you have requested me to come to Boston . . . for an interview with him. . . . I will come anyhow and bring Mr. Schofield in response to Mr. Coolidge's request *as conveyed to me in your letter of yesterday*. We cannot afford to let the opportunity go by for a trade with Mr. C." p. 45, l. 17 p. 45, ll. 28–31 p. 45, ll. 36–39

On Wednesday, the 2d of June, the plaintiff arranged with Mr. Coolidge for an interview between him and Mr. Short on the following day. p. 50, l. 6 p. 50, ll. 18–21

On Thursday, the 3d of June, Mr. Short came p. 50, ll. 27–28

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to Boston with Mr. Schofield and negotiations took place between them and Mr. Coolidge, the plaintiff being present, but no definite terms were reached. p. 50, ll. 24–26 p. 50, ll. 28–29

On Monday, the 7th of June, Mr. Coolidge came to the Boston Office and requested the plaintiff to telegraph Mr. Short to come to Boston on the following Wednesday or Thursday, and the plaintiff accordingly sent for Mr. Short. p. 50, ll. 22–23 p. 49, ll. 14–18

On Wednesday, the 9th of June, Mr. Short came to Boston, bringing Mr. Schofield; more negotiations took place between them and Mr. Coolidge, and on Thursday, the 10th of June, a written contract of sale was signed at the office of the Atchison Road, by which the Atchison, Topeka and Santa Fe Railroad Company agreed to buy, and the New York, New England and Western Investment Company agreed to sell these forty-five miles of completed road, with all stock and appurtenances and all outstanding bonds, together with certain other charters and franchises, at the rate of $9000 a mile of main track. It was provided in this agreement, that, on receipt of 590 of the 600 $1000 bonds outstanding on the completed road, $343,000 should be paid to the defendant at its office in the city of New York where these bonds were held in pledge. p. 50, ll. 32–33 p. 50, ll. 33–34 pp. 9–10 p. 9, l. 4. p. 10, ll. 4–5 p. 10, ll. 7–8 p. 9, l. 5 p. 9, ll. 13–16 p. 50, l. 42

On the 30th of June this agreement of sale was carried out by the delivery of these 590 bonds to the Atchison Company and the payment of the purchase money by that company to the defendant at its office in New York at a meeting at which the plaintiff was present, and it was then proposed to provide for the agreed perfecting of the title through foreclosure by a supplemental paper, under which the title was to be transferred to three trustees for the Atchison, Topeka and p. 50, ll. 39–41 p. 50, ll. 41–42 p. 50, ll. 42–43 p. 9, ll. 38–44 p. 15, "B. 1" p. 15, ll. 15, 40

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Santa Fe Railroad Company. This paper recites the delivery of these bonds. It was made after the payment of the purchase money for the 590 bonds, and provides for the payment of a small balance only. It was, however, never executed by all the parties to it. The title was subsequently perfected and the balance of the purchase money paid by the Atchison Company. The provision for a transfer to trustees was intended to avoid a doubt which arose as to the legality of vesting the title of a non-connecting road immediately in the purchasing company. p. 16, l. 8 p. 17, ll. 14–16 p. 16, ll. 42–44 p. 15, ll. 15–16 p. 17, l. 29 p. 51, l. 6 p. 51, ll. 2–5 p. 50, ll. 42–43

The plaintiff attended in New York during these transactions, at the request of the defendant's president. p. 50, l. 48

The defendant admits that its gross profits from the transactions here in question were over $79,000. p. 51, ll. 8–10

During the whole time of the plaintiff's connection with the defendant company there were no losses incurred on any of the business originating in the Eastern Division or transacted at the Boston Office, nor was there evidence of any losses on any other business transacted elsewhere by the defendant. The testimony given at the trial tended to show that the defendant carried on a kind of commission or agency business in which it did not itself incur any risk of loss. There was no evidence of any outstanding debts due from the company, and it declared and paid frequent and large dividends to its stockholders. p. 36, ll. 28–30 p. 35, l. 10 p. 35, ll. 42–50 p. 24, l. 13 p. 35, l. 34 p. 52, ll. 8–10

On the 30th of June, the day of the performance in New York of the agreement of 10th June and the payment of the greater part of the pur- p. 52, l. 35

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chase money for the railroad, the plaintiff presented to Mr. Short, as President of the defendant company, his claim for one-third of the gross profits on this transaction, and on the 2nd of July following he reasserted this claim in a formal written notice. p. 52, ll. 41–43 p. 53, l. 14 p. 53, ll. 14–25

The plaintiff also asserted his claim upon these gross profits by protesting against the making of certain dividends.

No dividends were ever declared by the Investment Company especially from these profits. Several dividends were paid as above stated from the "general earnings" of the company, of which the plaintiff received the proportion that came to the amount of stock held by him, but there was nothing in the declaration or notice of the dividends to indicate from what source the profits came. The plaintiff was never present at any meeting when these dividends were declared, nor was he ever notified to attend any meeting for the purpose of declaring a dividend. On the 30th of June, 1880, however, he entered his protest against the making of so large a dividend as was then proposed, on the ground that a part of the money held by the defendant in its treasury was in fact due to him. p. 52, ll. 28–29 p. 52, ll. 14–15 et passim. p. 52, ll. 8–10 p. 52, ll. 28–29 p. 52, ll. 30–31 p. 53, ll. 6–8 p. 52, l. 35 p. 52, l. 41

He received this and other dividends only after he had been advised by counsel that by so doing he did not waive any rights to his third of the commissions, and he gave written notice at and after the time of receiving the dividend of 1st July, 1880, that he "did not in any way waive his right to claim his one-third" of these gross profits. p. 52, ll. 25–28 p. 53, ll. 14–25 p. 53, l. 17

The contract of the 17th of December, 1879, between the plaintiff and defendant was many p. 55, l. 18

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times referred to by the several officers of the defendant company, both in letters to and conversation with the plaintiff, during the year of the continuance of the contract, and afterwards; p. 55, l. 21
and the rights of the plaintiff thereunder and the merits of the claim now in suit were several times p. 54, l. 3
discussed between the plaintiff and the defendant's officers, both in private interviews, and also at great length at a formal meeting of the p. 53, ll. 44–47
directors held on the 5th of August, 1880, at which one of defendant's lawyers was present, p. 55, ll. 24–27
and took part in a portion of the discussion; but until the commencement of this suit no claim was p. 55, ll. 26–29
ever made that the contract was invalid or illegal, p. 55, l. 27
or that the plaintiff could earn nothing whatever p. 55, l. 28
under it.

The plaintiff's declaration contains six counts. In the first, second, third, fifth and sixth, he declares upon the contract of 17th December, 1879, counting:

In the first, upon these transactions as "business originating in the Eastern Division and pp. 12–14
transacted at the Boston Office;" p. 13, ll. 35–37

In the second, upon a failure by the defendant pp. 7–8
to "furnish him the fullest information;" p. 8, l. 5

In the third, upon a failure by the defendant p. 8
'to favor the Boston Office so that parties within p. 8, ll. 14–21
its precincts might deal directly with it;"

In the fifth, upon these transactions as "busi- p. 14
ness originating in the Eastern Division;" p. 14, l. 28

In the sixth, upon these transactions as "busi- pp. 14–15
ness transacted at the Boston Office." p. 14, ll. 44–45

The fourth count contains common counts p. 8, ll. 24–48
for services rendered under the form of an "ac- p. 55, l. 36
count annexed;" a form of proceeding which

References to page and line of Printed Record.

exists in the Courts of Record of Massachusetts "when one or more items are claimed either of which would be correctly described by any one of the common counts." Pub. Stat. Mass. c. 167, sec. 2, § 7

The suit was originally brought by the plaintiff in the Supreme Judicial Court of Massachusetts, but was removed by the defendant to the Circuit Court for that District, on an affidavit of its counsel, which sets out that "he has reason to believe, and does believe, that from prejudice and from local influence said Investment Company will not be able to obtain justice in this Court, the same being a State Court." pp. 2–3 p. 4, ll. 27–32

Upon the trial of the case in the Circuit Court, before a jury, at the close of the testimony put in by the plaintiff, the defendant's counsel, by way of demurrer to the evidence, moved the Court that a verdict for the defendant be entered, on the ground that, even admitting all the evidence for the plaintiff to be true, it showed the memorandum of 17th December, 1879, to contain an illegal contract and that there was no ground of recovery, either under the counts on that memorandum, or under the common counts. The Court sustained this position, and directed a verdict for the defendant, by a ruling in which the plaintiff alleges error. p. 55 pp. 55–58

SPECIFICATION OF ERRORS RELIED ON.

The plaintiff in error avers that the learned Judge erred as assigned below, and relies upon the errors thus assigned:

References to page and line of printed record.

FIRST. In that he refused to allow the plaintiff in error (being the plaintiff below) to go to the jury on any of the counts of his declaration, ruling:

"I am of the opinion that the defendant is entitled to a verdict." p. 58, l. 19

Vide Infra, pages 3–91.

SECOND. In that he held that the contract in writing, dated the 17th of December, 1879, was unauthorized, illegal, invalid and void; ruling:

"If this contract is to be construed as granting to the plaintiff the enormous commission which he claims in this suit, one-third the gross profits of the company arising out of this transaction, without regard to the debts or the other liabilities of the company, I am of the opinion that it is a contract which the directors had no authority whatever to make with the plaintiff. The service which he actually performed seems to be simply that of a broker introducing a customer to his employer, through whom a contract was subsequently perfected. If the contract is to be construed so as to p. 57, ll. 14–30 cover a transaction of that kind, it was one that was unreasonable as affecting injuriously the rights of the stockholders of the company, and giving one of the directors of the company a right, without regard to the rights of creditors, to say nothing of the rights of the stockholders, in the assets of the corporation, giving him a profit without regard to the liabilities; and being of this nature, it was not a reasonable and

References to page and line of printed record.

fair contract for one of the directors of this corporation to make with his co-directors. * * * * * If it is to be construed as covering transactions of this nature, where the enormous profit realized in this case would be divided in the proportion of two-thirds to the corporation and one-third to the director, it seems to me to be unreasonable, and a contract that ought not to be sustained. * * * * * To hold that a director could make a contract with his co-directors by which the gross profits on a transaction of that kind and all transactions of a like nature should be divided in the proportion in which it is claimed that this contract provides for seems to me would be unreasonable, and ought not to be sustained. * * * There was no express contract."

p. 57, ll. 37–41

p. 57, ll. 49–51

p. 58, ll. 1–3

p 58, ll. 14–15

Vide Infra, pages 3–73.

THIRD. In that he ruled:

"The contract upon which the plaintiff's case is founded provides that the plaintiff was to be chosen one of the directors of the defendant corporation. It had in contemplation by its express terms that he was to be invested with the duty of superintending and directing its affairs as one of its directors, and was to have that relation to the company and its stockholders while he was performing his part of the contract. The contract must therefore be construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director."

p. 55, ll. 43–49

p. 56, ll. 1–2

Vide Infra, pages 57–63.

FOURTH. In that he ruled:

"There are no circumstances from which it can be concluded that any kind of an implied contract existed between the investment company and the plaintiff by which he was to have a commission on this transaction."

p. 58, ll. 15–18

Vide Infra, pages 64-91.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

References to page and line of printed record.

FIFTH. In that he ruled:

"In regard to the claim of the plaintiff on the count on an account annexed, I am also of opinion that there is no evidence in the case upon which this count can be sustained." p. 58, ll. 4–6

Vide Infra, pages 64–91.

SIXTH. In that he ruled:

"It seems to me that the contract was intended by the parties to relate to a different class of transactions from that which is set forth in the declaration as the breach of the contract upon which the plaintiff relies to maintain his action." p. 56, ll. 33–36

Vide Infra, pages 78–80.

SEVENTH. In that he ruled:

"They established by this contract a division comprising four of the New England States, with an office in Boston, and placed the plaintiff at the head of the Boston office, intending to give to him the business originating and transacted within the four States. Now it appears that the business which culminated in the sale of the railroad to the Atchison company was a business which had originally come to the New York office." p. 56, ll. 36–43

Vide Infra, pages 80–83.

EIGHTH. In that he ruled:

"Mr. Hubbard was not a broker; he does not claim to have acted in any sense as a broker between the parties, under any contract that he was to receive a commission for his services; and to hold that for the services which he rendered in this case he is entitled to recover any compensation, under the circumstances, seems to me to be altogether out of the question. He was not a broker." p. 58, ll. 8–14

Vide Infra, page 84.

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THE PLAINTIFF'S POINTS.

The right of the plaintiff to recover the amount claimed by him is disputed upon three grounds:—

I. That the written contract made by him with the defendant on the 17th of December, 1879, is in itself unauthorized and illegal, and gives him no right to claim any compensation under it.

II. That if this particular written contract be illegal, or contain a single illegal provision, the plaintiff can neither recover the contract price for his services, although these services have been fully rendered by him and accepted by the defendant, and although the contract has been entirely performed on the plaintiff's part, nor recover anything whatever for any services rendered to the defendant in the field covered by the contract, even though these services are entirely independent of this supposed illegal term. In other words it is contended that the plaintiff cannot support a count for services rendered, or a count upon a quantum meruit, by putting in evidence of any previous actual request for these services, or actual offer to pay for them if rendered; nor by offering the *fact* that this contract was actually made as in itself evidence implying a request to the plaintiff to perform the services; nor offer the *fact* that these terms of compensation were agreed upon, as evidence of the value which the parties themselves put upon these services at the time.

III. That even if the plaintiff were technically entitled to sue upon a common count, there is no evidence to go to the jury upon such a count to show that the plaintiff rendered services to the defendant in the manner claimed.

I.

VALIDITY OF CONTRACT OF 17th DECEMBER, 1879.

The learned Judge, before whom the trial of the cause was begun, refused to submit to the jury the consideration of the plaintiff's claim under this contract, on the ground that the contract was one which "the directors had no authority to make."

By this want of authority in the directors may have been meant, either that the directors had never actually received from the stockholders the authorization necessary to entitle them to make this contract in the name of the corporation; or, that the corporation was itself incompetent to authorize such an contract to be made, because either the subject-matter or the terms of the contract were beyond the scope of the corporation's chartered powers. As Vice Chancellor Kindersley puts the difficulty in

The Earl of Shrewsbury v. *The North Staffordshire Railway Co.*, (35 L. J., [N. S.,] Ch., 156, 172, 1865,)

"When you speak of its being ultra vires of the company, you mean one or other of two things, either that you cannot bind all the shareholders to submit to it, or that it is ultra vires in this respect, that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbour."

In this case the court may have meant, either that the defendant *did not* in fact make this contract because the stockholders had never given to Mr. Short and his co-directors the necessary authority to contract with the plaintiff as they did, or, that the subject-matter or the terms of the contract were such that the defendant *could not legally* make it because not even all the stockholders acting in concert would have been competent to enter into a contract such as that in suit.

The learned Judge farther regards the plaintiff himself as incapacitated from making this agreement with the company because of the relation he was to assume towards the corporation.

These three objections evidently exhaust all that can be said against the validity of this contract. If it be in fact invalid, it must be for one of the reasons above stated, *i. e.*

Either

1st, That the defendant's officers had no authority in fact to make it;

Or, 2d, That the subject-matter or the terms of the contract itself are such as to make it inherently illegal, even if entered into by officers possessed of all possible powers of the corporation and duly authorized by the vote of the stockholders;

Or, 3d, That the plaintiff was in some way incapacitated from entering into such a contract even if the corporation could have done so.

1.

THE AUTHORIZATION IN FACT BY THE STOCKHOLDERS.

As to the powers in fact possessed by defendant's officers authorizing them to act for the defendant corporation and to contract in its name with the plaintiff; and whether they acted within or beyond these powers in making with him the contract of 17th December, 1879.

a.

Certain elements of the authority of the individuals who dealt with the plaintiff are beyond dispute. They were in fact the duly appointed, qualified and acting officers of the defendant corporation. They had all the general authority which was implied by this fact.

This general and implied authority was in itself sufficient, apart from especial authorization, to empower the officers to make any contract with the plaintiff for the employment of his services which the corporation could itself make.

The *Statutes of Illinois*, under which the defendant derives all its powers, lay down the rule for all corporations. "The corporate powers shall be exercised by a board of directors or managers."

Revised Stat. Illinois, 1880, Chap. 32, Section 6.

The *charter* of the defendant provides, (R. p. 60, ll. 8-9,) that "the affairs of the company shall be managed by a board of directors."

There could be no "affairs of the company" more fundamentally important than the appointment of the agents who are to act for it in doing the business which the corporation is created to transact, and, as incidental to that appointment, the determination of their compensation.

The Revised Statutes of Illinois, 1880, (Chap. 32, Section 6,) in treating of a corporation, expressly provide that "The officers of the company shall consist of a president, secretary and treasurer,

and such other officers and agents as shall be determined by the directors or managers." The charter of the defendant, (R. p. 60, ll. 11-12,) provides that "the directors shall have power to appoint other officers and agents, and prescribe their duties." A recent case declares this to be not merely a power granted to the directors, but a duty imposed upon them. "The power to appoint agents . . . is a *trust* reposed alone in the directors."

The Flagstaff S. M. Co. of Utah, Limited v. *Patrick*, 2 Utah, 304, 316.

"The law favours the acts of one in reputed authority," as Mr. Justice Gibson phrases the rule in

Baird v. *The Bank of Washington*, 11 Serg. & Rawle, 411, 415, 1824.

Or, as Mr. Chief Justice Bigelow puts it, in speaking of the implied authority of the officer of a corporation in

Lester v. *Webb*, (1 Allen, 34, 36, 1861,)

"The rule is well settled, that if a corporation . . . hold him out to the public as having the *general authority implied from his official name and character*, . . . they are bound by his acts done within the scope of such implied authority."

See also *Merchants' Bank* v. *State Bank*, 10 Wallace, 604, 1870.

There surely can be no authority more necessarily implied by law than a power in the head of any corporation to provide it with the hands needed to do the work for which the body is incorporated, and no act more necessarily within the scope of this implied authority than a contract to secure the use of these hands, and to fix their work and compensation. The decisions of the courts of Illinois, the State under whose laws the defendant is incorporated, are especially emphatic in giving this authority by implication to the president and other agents of a corporation.

In *Smith* v. *Smith*, (62 Illinois, 493, 496, 1872,)

Mr. Justice Walker says: "Corporations usually act through their president, or those representing him. He being the legal head of the body, when an act pertaining to the business of the company is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body."

A few years later, in 1877, the law was still more broadly laid down by Mr. Chief Justice Scholfield in

The Singer Manufacturing Co. v. *Holdfodt*, 86 Illinois, 455, 459.

"Ever since the decision in St. Louis, Alton and Chicago Railroad Company *v.* Dalby, . . . it has been regarded as settled law . . . that *a person openly and notoriously* exercising the functions of a particular agency of a corporation will be presumed to have sufficient authority to so act."

No man was ever more openly or more notoriously held out as the head and representative of a corporation than was Mr. Short throughout the two years and more of the plaintiff's dealing with the defendant company. No one can read the correspondence without seeing that he assumed throughout to speak for the corporation. No one can study the whole case and not see that he was always permitted to do so by both stockholders and directors. No whisper was ever heard questioning his full authority until after the bringing of this suit, long after the contract with the plaintiff had not only been made, but fully performed.

b.

The three men with whom the plaintiff dealt were not only officers of the company but they were the only officers through whom it could make this or any other contract.

The President, Vice-President, Secretary and Treasurer are the only officers of the company expressly named by the charter and by-laws, (R. p. 60, p. 34,) and Messrs. Short, Debevoise and Watson, who made the contract with the plaintiff, are admitted to have held these four offices.

Beyond these four officers mentioned by name there is no governing power named or implied by the charter or by-laws except the board of directors. This board then consisted of five members, of whom Messrs. Short, Debevoise and Watson were three. So that these gentlemen were not merely directors, as well as special officers, but they were a majority of the board and could control their decisions.

c.

In addition to the general and implied contracting power which Mr. Short possessed as chief executive officer of the company

he held a special mandate in respect to this contract with the plaintiff of 17th December, 1879.

The stockholders, at their meeting in August, 1878, had laid down by a distinct vote the general policy of opening branch offices in other cities. (R. p. 22.) In obedience to this general command, the directors (R. p. 22, ll. 10-21,) had formally instructed the president to take the necessary measures to open an office in Boston "at such time as in his discretion might seem desirable." From the time of Mr. Short's first call upon the plaintiff in October, 1878, his pertinacity in following up the subject of the Boston office during the months of interviews and correspondence that followed shows conclusively that Mr. Short, in the exercise of his discretion, considered that this "desirable time" for establishing the Boston office had clearly arrived. There can be no doubt whatever that Mr. Short regarded himself as not merely authorized, but in duty bound to make *some* contract to that end.

d.

More than this, the directors not only gave the president special authority beforehand to contract with some one for the charge of the Boston office, but they afterward formally ratified this particular contract made by him with the plaintiff. (R. p. 33, ll. 26-34.)

This ratification is the more conclusive because all the directors present at the meeting,—they were indeed the majority of the whole board,—had themselves made the contract with the plaintiff, had "discussed the items one by one," (R. pp. 30-31,) and were familiar with all its terms. Either at the same time, or within a few days of this first formal ratification, the contract was again carefully studied by *all* the board of directors, and the president, in his letter of 11th Feb., 1880, sends to the plaintiff their conclusions as a decision which had been reached by the board "upon a *full conference* of the . . . directors, and *an examination and consideration of the agreement concerning the Boston office.*" (R. p. 54, ll. 41-45.) Evidently not only the three directors named, but the other two members of the board, had full knowledge of all its terms at this meeting, if not at the time of the first, and no word of dissent from the action of their co-directors anywhere appears.

It is not incumbent on the plaintiff in error to go into the details of the meetings at which these special authorizations were given, or these ratifications made, and to show that the defendant's officers had called and held these meetings and passed these votes in all details as the statutes and charter and by-laws required. "The law itself," as Mr. Justice Story said as long ago as 1827, in the case of the *Bank of the United States* v. *Dandridge*, (12 Wheaton, 64, 69, 70,) "presumes that every man . . does his duty, until the contrary is proved. . . . The same presumptions are . . . applicable to corporations. Persons acting publicly as officers of the corporation are to be presumed rightfully in office; acts done by the corporation, *which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter.* . . If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." Indeed, as Mr. Justice Wells points out in

Sherman v. *Fitch*, (98 Mass., 59, 64, 1867,)

"*It is not necessary that the authority should be given by a formal vote.* . . . An act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long continued acquiescence, may . . . be regarded as the act of the corporation. Authority in the agent of a corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in the case of individuals."

The plaintiff may even go farther than this. Should there by chance have been any technical flaw in the formalities of these votes or authorizations, he may fall back upon the doctrine so clearly laid down by Lord St. Leonards, in advising the House of Lords in

Bargate v. *Shortridge*, 5 House of Lords Cases, 297, 318, 325, 1855.

Where, says Lord St. Leonards, "the act to be performed is within the power of the directors, where it is their duty to do it, and . . . they neglect to do it, and by their neglect damage accrues to third parties, a Court of law, . . . or a Court of equity, *will not allow the company to take advantage of such neglect.*

That I apprehend to be a plain rule, . . . established by all the authorities upon this subject. . . . A company would be bound, though neglecting to perform ceremonies which ought to be performed, and consequently . . . the shareholders would be bound."

The same doctrine was affirmed by this court in

Commissioners of Douglas County v. *Bolles*, 94 U. S., 104, 1876.

In a word, the plaintiff not merely avers that these specific authorizations and ratifications were made with all apt forms to bind the corporation, but may successfully deny the right of the defendant to question the fact.

e.

But there was something more than all this.

The three individuals with whom the plaintiff dealt not only held all the corporation's official authority to deal with him, both that coming from general implication and that given by special authorization, but they had, back of all this, the power to create and control this authority. They not merely controlled the board of directors by their votes as directors, but they controlled the creation of the board itself by their control of the stock.

They had not merely the right and the power to make *some* contract with the plaintiff; they had the power to make, within the scope of the corporation's powers, any contract with him they saw fit, because, being a majority of the directors, they could approve such terms as they thought best, and, holding a majority of the stock, they could command a vote to approve the action which they had taken as directors.

This power was not merely one of might; it was one of right. It could not have been taken away from them *so long as they were acting in good faith*. No stockholder among the minority could have possibly prevented them, as directors, from making or ratifying any contract within the scope of the corporation's chartered powers, which they saw fit to make or ratify, *provided only* that they were doing what they thought best for the interests of the whole corporation.

It is perfectly immaterial whether they were mistaken or not. The action which they thought best for the corporation might ultimately prove to be really most unwise and prejudicial to it; but if they were fairly exercising, to the best of their judgment, the quasi-

judicial power placed in their hands by the stockholders, if they were doing what seemed to them *best for the whole corporation*, their acts would be binding on the corporation, and no stockholder could stop them, by injunction or otherwise, because he failed to approve their judgment. This principle is laid down in the cases too clearly to be questioned.

In *Re German Mining Company, Ex parte Chippendale*, (4 D. G., M. & G., 19, 39, 1854,)

where a question arose concerning the votes of directors in carrying on certain mines which turned out to be unprofitable, Lord Justice Turner says: "If the directors in the *bona fide exercise of their discretion*, and their bona fides is not questioned, *thought proper* to continue the mines, . . . I see no ground on which the [opposing parties] can found any objection upon the ground of the mines having been so continued."

The leading case of

Dodge v. *Woolsey*, (18 How., 331, 343, 1855,)

decided that a stockholder may take action to restrain acts of the directors amounting to a violation of the charter, or similar breaches of trust, but not for acts involving an error of judgment merely.

More recently Mr. Justice Miller stated the law in giving the opinion of the court in the recent case of

Hawes v. *Oakland*, 104 U. S., 450, 460, 1881.

He defines distinctly the grounds on which a stockholder can step forward in the courts to interfere with the action of his directors, saying: —

"There must exist as the foundation of the suit—Some action or threatened action of the managing board of directors . . . *beyond the authority conferred* . . . *by their charter*; . . . or . . . a *fraudulent* transaction; . . . or where the board of directors . . . are acting for their *own interest*."

The rule in this court had been previously laid down by Mr. Justice Nelson, in defining the right of a stockholder to take action himself to protect the interests of the corporation where the board of directors refused to do so, in

Memphis City v. *Dean*, 8 Wallace, 64, 73, 1868.

"The charter confers upon the directors representing the

body of stockholders, the general management of the business of the company. *There must be a clear default*, therefore, on their part, *involving a breach of duty*, . . . to authorize a stockholder to institute the suit in his own behalf, or for himself and other stockholders who may choose to join."

The reason of the rule is very well stated by Vice-Chancellor Wigram, in one of the earliest cases on the subject,

Foss v. *Harbottle*, (2 Hare, 461, 493, 494, decided in 1843,)

in which he shows that when "the transactions admit of confirmation," it is the duty of objecting shareholders, before attempting to call in the aid of the court, to cause some meeting of the shareholders to be held and ascertain the will of the majority. "The corporation might elect to adopt those transactions. . . . Whilst the court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. . . . The governing body of proprietors . . . may so bind even a reluctant minority."

The "governing body of proprietors" of the defendant company not only may, but must, have been content with what was done, for it was what they themselves had done, of their own free will, and after mature deliberation. There can be no possible doubt that they would, as the Vice-Chancellor puts it, "elect to adopt those transactions."

In speaking of the rule that a corporation must take action only through the majority of its board of directors, and that stockholders in their private capacity cannot interfere with the action of the majority of the board, Lord Justice Sir W. M. James, in

Gray v. *Lewis*, (L. R., 8 Chan. App. Ca., 1035, 1051, decided in 1873,)

says: "As I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something *fraudulent* against the minority, who are overwhelmed by them." There is no pretence that there was any fraud on the part of the acting majority of the defendant's directors. On the contrary, the court expressly finds that there was "no evidence

in the case . . . that . . . the board of directors had any purpose to perpetrate a fraud on the corporation." (R. p. 56, ll. 19-20.)

In the *Case of St. Mary's Church*, and

The Commonwealth v. *The Trustees of St. Mary's Church*, (6 Sergt. & Rawle, 498, 508, 1821,)

Mr. Chief Justice Tilghman, in refusing the aid of the court to certain stockholders who sought to oppose the action of the board of directors of the corporation, (called "trustees,") on certain proposed alterations of the charter, says that "the court did not consider itself authorized to act upon any alterations, . . . which were proposed by individual members of the society in opposition to the board of trustees, in whom the corporate rights are vested. . . . The present motion . . . is to compel the trustees to act . . . contrary to their own *judgment*. With what propriety, then, can the court grant it?"

Their best judgment and their best ability the directors are of course bound to give to the discharge of their trust; but they are not responsible to the corporation or stockholders for more than this, and no court has required more.

In a recent case in England, on the responsibility of directors to the shareholders, or to the company,

Overend, Gurney, & Co., Limited v. *Gurney*, (L. R., 4 Chan. App. Ca., 701, 714, 718, 720, 1869,)

it was sought to make directors liable, in equity, for acts done by them while acting officially in that capacity. The case came up, as Lord Chancellor Hatherley states, upon "a bill by the company against the directors, alleging in fact . . . that they had not misconducted themselves in any way which could be regarded as fraud, but had *misconducted themselves in purchasing that which it was unwise and imprudent* for them to purchase." . . . "If," says Lord Hatherley in giving his opinion, "I do not find that they have acted in breach of their duty — *if I do not find that they have done anything more than make a bad bargain* — it appears to me that I cannot assume that the company are thereupon entitled to say that [the director] is responsible for a breach of trust. . . . The only allegation against him is that he *has not made a sound and profitable bargain*, . . . *I think the shareholders must take the consequences of the manner in which their business was conducted by those whom they have trusted to act as their agents.*" This decision

dismissing the bill against the directors was afterward affirmed in a branch of the same case,

Overend & Gurney Co. v. *Gibb*, L. R., 5 H. L., 480, 496, 501, 1872.

Lord Chelmsford, in advising the House to dismiss the appeal, says: "There is no charge in the bill of any fraudulent conduct on the part of the directors, or of any breach of duty, or of any negligence, or of their not having *honestly done what they considered to be their duty towards the company.* . . . They did it, it is admitted, honestly and fairly, and believing that they were doing it in the discharge of their duty."

The cases in this country follow clearly in the same line. It is not necessary to quote them in detail.

See, for instance —

Spering's Appeal, 71 Pa. St., 11, 1872.

Hun v. *Cary*, 82 New York, 65, 70, 1880.

That Messrs. Short, Debevoise and Watson were in fact acting in good faith toward their corporation, it is impossible to doubt. The court expressly finds that there is "no evidence in the case from which to infer that either the plaintiff or the board of directors had any purpose to perpetrate a fraud on the corporation, or to grant to the plaintiff any undue privileges."

Record page 56, lines 19-22.

There is no suggestion that these officers were to obtain any personal advantage out of the contract with the plaintiff other than the advantage which would accrue to them as stockholders of the company. Their only object in making the contract was to increase the earnings of the company and thereby gain money for themselves through the increased dividends on their stock; a gain, it is needless to say, which would benefit all other stockholders equally with themselves. It is impossible to conceive any other object than this in making the contract with the plaintiff. No fraud or underhand dealing is anywhere suggested; certainly none can be presumed.

To suppose that they had any other aim in view than to make money for the corporation, *i. e.* for themselves, is to belie the keenness which shows itself throughout the whole transaction. No one can read through the correspondence and the history of the negotiations which lead up to this contract of 17th December, 1879, without seeing that Mr. Short, acting on behalf of himself and his co-directors,

seems to have established that point as long ago as 1839. In speaking of a corporation, Mr. Chief Justice Taney says in that case: "It must dwell in the place of its creation, and cannot migrate to another

dismissing the bill against the directors was afterward affirmed in a

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The case of

Allen v. *Wilson*, (28 Federal Reporter, 677, 679-680, U. S. C. C., Northern Dist. Illinois, 1886,)

published since this brief was in print, is a very strong authority to the point that neither the company nor the stockholders could have objected to Mr. Short's acts. In that case, Wilson stood in much the same position as Short occupied in the case at bar. He was president, director and majority stockholder; but Wilson went much farther than the case at bar, by letting a contract be made with *himself*. Even under such circumstances the court holds that, as none of the stockholders objected to his acts at the time, they cannot, after waiting to see whether the contract would prove profitable or not, attempt to set it aside, saying: "The board, with knowledge of what Wilson had done, ratified the very things which are now objected to, and the stockholders, including the complainants, either expressed their satisfaction, . . or remained silent for years."

This shows that in the case at bar none of the stockholders of 17th December, 1879, could have objected to the contract of that date. Those who became stockholders later by purchase of old stock of course have no right to object, either under the rule of this court, or on the general ground stated by another late case,

Venner v. *Atchison, Topeka and Santa Fe R. R. Co.*, (28 Federal Reporter, 581, 591, U. S. C. C. Dist. Kansas, 1886,)

that such a stockholder "simply stands in the shoes of one who either directly voted for, or ratified by receiving the benefits of, such action, and will not be heard to now question its validity." Holders of newly created stock must of course take the corporation as it stood at the time of its creation.

These late cases, together with those already cited, seem to show conclusively that no one could have obtained an injunction against the contract of 17th December, 1879, when it was being made, or while it remained executory. *A fortiori*, it must stand when executed and rights have been acquired under it.

which lead up to this contract of 17th December, 1879, without seeing that Mr. Short, acting on behalf of himself and his co-directors,

was not only desirous of making money for his company but was exceedingly anxious to make this arrangement with the plaintiff. He secures an introduction to him in 1878, and offers not only the care of the Boston Office, and one-third commissions, but suggests possible "legal work" as an inducement. He is "far from urging an arrangement," but he continues to make propositions to the plaintiff, one after the other, all substantially to the same effect, for over a year. When the plaintiff declines them, he "very much regrets" his decision because he "had hoped to have" him etc.; and proposes to come to Boston and "go over the matter" again. In a word, Mr. Short and his associates, in securing the services and the money of the plaintiff on the terms which they made with him, were clearly doing an act which, in the exercise of their best judgment, was for the advantage of the whole corporation; and while they were so acting they not only held the controlling power as stockholders to ratify this act, but they were in a position in which no dissenting minority stockholder could have possibly hindered them from doing it.

The case at bar is, of course, not an attempt by the minority stockholders to restrain Mr. Short and his associates from making the contract, nor a bill to hold them liable for having made it, but it affords a very good test of the validity of the contract to inquire whether such an attempt could have succeeded.

That they did not actually go through the form of voting as stockholders to ratify what they had done as directors and officers is immaterial. To suppose that, after making a contract in their capacity of officers, and approving the act in their capacity of directors, they could, in their capacity of stockholders, refuse to ratify it, would be to reduce the whole matter to the level of burlesque.

f.

It seems almost superfluous to add that if Mr. Short and his fellow-officers had the authority to make this contract at all they could exercise that authority as well in New York as in Illinois.

The decision of this court in

The Bank of Augusta v. *Earle*, (13 Peters, 519, 588,)

seems to have established that point as long ago as 1839. In speaking of a corporation, Mr. Chief Justice Taney says in that case: "It must dwell in the place of its creation, and cannot migrate to another

sovereignty. . . . Yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. . . . Natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside; and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract . . . in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place?"

This permission of the laws of the State of New York must be presumed, for there is no evidence of any law of New York forbidding such contracts, and, as Mr. Justice Field says in

Cowell v. *Springs Company*, (100 U. S., 55, 59, 1879,)

. . . "In the absence of positive direction to the contrary, . . . corporations created in one State . . . are permitted to carry on any lawful business in another. . . . If the policy of the State . . does not permit . . . it must be expressed in some affirmative way."

g.

Before leaving this point of the case, it ought to be noted that the authorization is not only proved by previous acts, but also by the subsequent acquiescence and ratification which are fairly to be presumed from the defendant's neglect to object to the contract, after it had been made, until the actual trial of this case.

In *Zabriskie* v. *Cleveland, Columbus and Cincinnati R. R. Co.*, (23 Howard, 381, 400, 1859,)

Mr. Justice Campbell, in delivering the opinion of the court, says: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or *silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.*"

Even had there been fraud, the defendant would have been obliged to notify the plaintiff of its intention to regard the contract

as unauthorized; and there being neither fraud nor notice of intent to object he was certainly entitled to rely on the authorization which their silence implied.

In *Twin-Lick Oil Company* v. *Marbury*, (91 U. S., 587, 591, 592, 594, 1875,)

Mr. Justice Miller, delivering the opinion of the court, says: "The doctrine is well settled, that the option to avoid . . must be exercised within a reasonable time. . . . In this class of cases the party is bound to act with *reasonable diligence* as soon as the fraud is discovered, or his right to rescind is gone. *No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed.* . . . The plaintiff has delayed too long."

Clearly the "invalidity" in the contract which caused the learned Judge to take it away from the consideration of the jury is not to be found in any lack of actual authorization from the corporation to its officers to make it. If it could not have been made with the authority they held then all the stockholders acting in concert could not have made it or ratified it. If the invalidity exist, it must be sought for in some inherent vice in the terms of the contract itself, rendering it illegal, or in some incapacity of the plaintiff to contract.

2.

THE LEGALITY OF THE CONTRACT.

The next step then is to consider if there is any inherent illegality in

(A) the subject matter, or,

(B) in the particular terms,

of the contract, which would put it outside the limits of the possible contracting power of the defendant corporation. In other words, whether the contract is such that not even the stockholders exercising all the powers of the corporation could have made it, by any form of vote.

What are then its subject-matter and its several terms?

The whole may be stated, graphically, somewhat as follows:—

SUMMARY OF MEMORANDUM OF 17th DECEMBER, 1879.

CONTRACT FOR STOCK SUBSCRIPTION.

Subject-matter treated of.	*Various terms of the Contract.*
1. Stock subscription.	1. Plaintiff required to subscribe or procure $10,000 in cash.
2. Consequent rights of plaintiff.	2. To be elected a director.

CONTRACT FOR SERVICES.

1. Securing of services of plaintiff and definition of the position he is to hold.	1. Plaintiff to open and take charge of Boston office. 2. Plaintiff to devote his energies to the defendant's service. 3. Plaintiff to act as agent under the title of Assistant Vice-President. 4. Defendant to give plaintiff direction of Boston Office. 5. Defendant to furnish all outlays, etc. 6. Defendant to favor direct dealings with Boston Office. 7. Defendant to furnish full information to the plaintiff.
2. Determination of his compensation.	8. Compensation fixed at 1-3 gross profits on business in plaintiff's office or division (less book-keeper's salary), said one-third not to be less than $1800 a year. 9. Method of computation, viz: Payment = $1,800 + 1-3 [gross profits — ($5,400 + book-keeper's salary.)] 10. Time of payment.

This simple statement of the memorandum of the 17th of December in its component parts is sufficient in itself to bring out one most important fact—a fact which appears at once upon any careful study of the preliminary negotiations—namely, that it really *contains two separate and distinct contracts;* one concerning the subscription to the stock of the company, and the plaintiff's rights in consequence of this subscription; the other concerning the employment of the plaintiff as agent and manager of the Boston Office, and his consequent compensation. A careful examination of the transactions, (R. pp. 22-33,) leading up to the making of this memorandum will show, not only that there were two contracts, but that these two contracts were the results of two distinct series of negotiations, beginning at different periods, although, when once begun, they were carried on side by side.

The earlier is the negotiation arising out of the repeated "propositions which were made for his services as *manager*, for the company, of the Boston office," (R. p. 24, ll. 32, 33,) or "to take the Boston office," (R. p. 28, l. 20,) beginning in October, 1878, and referred to throughout, in the correspondence, as a proposal for his "becoming an agent for the company," (R. p. 25, ll. 3-4,) or taking the "agency;" (R. p. 25, l. 44;) again, as a proposition for the plaintiff's becoming the "Boston agent," (R. p. 26, l. 38,) or more simply the "agent", (R. p. 27, l. 8,) and spoken of by Mr. Short, on the very day of completing the arrangement, as one for "taking charge of the Company's office in Boston," (R. p. 29, ll. 2-3,) and again, as concerning "the charge of the Boston office." (R. p. 30, l.19.)

The other and later negotiation arose out of the desire of Mr. Short to obtain ready cash for the company from the plaintiff directly, or, through him, from the friends whom he represented. When this negotiatiation first began does not appear. No mention of it is made in the correspondence or elsewhere earlier than May, 1879, (R. p. 25, ll. 27-30,) about seven months after the opening of the negotiations for the agency, and it probably took shape at about that time. The approaches by Mr. Short are made gradually in this case. He begins by allusions to "opening avenues to large money"; (R. p. 25, l. 18;) then proposes that the plaintiff shall "dispose of" or "sell" some stock in Boston, apparently without suggesting that he is to buy it himself; (R. p. 25,ll. 27-30;) he

then requires that the plaintiff shall "either buy or place" $10,000 worth of the stock; and finally makes the plaintiff accept a condition in the contract of agency which results in his having to transfer that amount of money from his own pocket to the treasury of the company, to remain at the risk of the defendant's business.

The provision for electing the plaintiff a director *arose from, and formed a part of this requirement for the investment in the stock, and had nothing to do with the contract of agency.* This is a most important fact, and is evident from a careful examination of the positions of the parties, as shown by the bill of exceptions. The plaintiff objects throughout to the proposal that he shall risk so much money in a new enterprise, though he offers to invest "$1,500 to $2,000" from his own funds, if necessary. (R. p. 27, l. 2.) He is still more strenuous in his "unwillingness to place himself under obligations" to others for the money, saying with decision: "I cannot afford to place myself under obligations to friends by asking them to help me into an office of profit, especially where some unforeseen occurrence might cause a total loss to them of their investment." (R. p. 27, ll. 3-7.) He is willing to accept a much lower salary for the agency than he finally agreed to take if only he could open the office "without having to place himself under obligations." (R. p. 27, ll. 8-11.) He even goes so far as to positively decline certain propositions which were conditioned on a large investment in stock, even if his decision should result in breaking up all the negotiations for the agency; (R. p. 27, ll. 1-13;)—"a conclusion," he writes, "arrived at solely because of my unwillingness to place myself under obligations to friends and others." (R. p. 28, ll. 4-6.)

The plaintiff was evidently anxious as to the character of Mr. Short and his associates, who were strangers to him, and timid about intrusting his own or his friends' money to their care. He writes frankly to Mr. Short that "the only obstacle which is likely to meet" him in the matter of placing or buying stock is "that I know so little of the men who comprise your board of directors. People ask who is Mr. Short? Who is Mr. Watson? Who is Mr. Debevoise? . . . The success of your company depends largely on the characters of the men who manage it." (R. p. 25, ll. 33-38.) His anxiety on this subject is so great that he even thinks it necessary to require a written stipulation from Mr. Short and his co-

directors, expressly framed to protect him from being required to handle securities of "doubtful character," or which might "reflect on the credit" of the company, or on himself as one of its officers. He hesitates at the very last about undertaking the agency if he must at the same time risk money in the company, and, on the 17th of December, it was only on being informed that two well known capitalists were to become heavily interested in the company, that, "considering that a very good alliance," he consented to come to terms. (R. p. 30, ll. 27-30.) It is perfectly evident that the proposition for his becoming a director, from whatever source it came—and it appears (supra, p. iv,) to have come from Mr. Short himself—*was intended to allay this anxiety of the plaintiff concerning the investment*, by placing him in the directory where he could learn what was being done, and protest against anything of which he did not approve. For farther than this the plaintiff's directorship did not extend and does not seem to have been intended to extend. The correspondence and statements in the bill of exceptions show that the plaintiff was habitually in Boston, carrying on his work as agent; that the New York directors constantly held meetings without him; that he was sometimes not notified of meetings, and that "he was never notified of any meeting for the purpose of declaring dividends." The directorship was one of observation rather than of work, and the provision for it obviously exists only as a part of the contract concerning the investment which made the directorship necessary.

The directorship had nothing to do with the contract of agency, and was never treated as a part of that contract, either in the correspondence or in the company's records. On the contrary, the two agreements are referred to as different matters by Mr. Short, in a letter to the plaintiff, written on the very day of signing the memorandum, the one as an agreement for "becoming a stockholder and director in our company," the other as one for "representing us in Boston." The same distinction is made in the records of the company. At the meeting of 27th December, 1879, the plaintiff having already performed his part of the contract concerning the stock by paying his money, the directors proceeded to carry out that contract on the part of the company by electing (or rather attempting to elect) the plaintiff a director. This was supposed to have com-

pleted that transaction, and the only remaining executory contract —that for the agency—is reported as an "agreement with Mr. Hubbard by which Mr. Hubbard assumes the *superintendence and management* of the company's affairs in the States of Maine, Massachusetts,*" etc. This is formally ratified by vote. The other is still more completely ratified by performance, and having been performed, ceases to exist as a contract, and is not again mentioned in the record or elsewhere; while the "agreement respecting the Boston Office" was frequently considered by the directors, (R. p. 54, ll. 41–42,) and the merits of the claim made by the plaintiff for his compensation earned under it were discussed by the directors at a formal meeting "at great length." (R. p. 54, ll. 2-3.)

The Contract concerning the Stock Subscription and the Directorship.

It is not necessary to consider here either the subject matter or the particular provisions of this contract, farther than to say this:

The provision for electing the plaintiff a director has two aspects according as it is looked upon in its *result* as placing the plaintiff in a certain fiduciary relation to the company, or as an *executory agreement* by the defendant corporation to elect him to that position.

The former aspect of the question is really identical with the objection that the plaintiff was in some way personally incapacitated from making this contract; and will be considered more conveniently under the head of the plaintiff's capacity to contract, (infra, I. 3, pp. 57–63.) The other view concerns this provision considered as an executory contract by the defendant to elect the plaintiff a director. This particular feature of the contract does not seem to be treated by the court as in any way illegal, and it is therefore unnecessary to especially consider it. But it may be worth saying in passing:—

That the provision to elect the plaintiff a director is totally independent of the agreement to give him charge of the Boston Office as "manager" or "agent."

That the whole agreement concerning the charge of the Boston Office and Eastern Division might have been made without any reference to the plaintiff becoming a director.

That it might not only have been made, but it might have been

*The error in the recital of the territory is immaterial, for all the directors present were familiar with the terms of the contract, having themselves made it.

carried out whether the agreement to elect the plaintiff a director were ever carried out or not.

That as a matter of fact the agreement to elect him a director *never was carried out* until after the transactions in question took place.

That it never was carried out by the directors at all, because they could not carry it out, (though they attempted to do so,) there being no vacancy in the board, and no power to create a director, except to fill a vacancy. (R. p. 34, ll. 40-41, p. 34, l. 46, p. 35, l. 1, p. 60, ll. 12-13.)

That when the plaintiff was finally elected a director at the regular annual stockholders' meeting on the 5th of June, 1880, (R. p. 34, ll. 3-4,) there is no evidence whatever to show that the act was a performance of this agreement or to connect it in any way with this contract of 17th December, 1879. No reference to it appears in evidence. If there was anything illegal in the agreement to elect him a director the presumption certainly arises that he was *not* elected in pursuance of that agreement. There is no evidence to show that it was so done, and, in the absence of any evidence to the contrary, the stockholders' act will of course be presumed to have been legally, and not illegally, done. They had a perfect legal right to elect the plaintiff a director of their own motion, if they wished to have him in that office, and it must be presumed that they did so elect him.

That not only is the legality of this executory agreement to elect the plaintiff a director supported by principle and admitted by the ruling of the Court, but it is sustained by the decided cases, which take a position much in advance of that which the plaintiff needs to assume. For instance, in

Kitchen v. *The St. Louis, Kansas City & Northern R'y Co.*, (69 Missouri, 224, 242, 1878,)

where certain directors of the company had, in good faith, invested large sums of money in the purchase of the company's bonds, accompanying their purchase by a requirement that the company should not merely elect them directors, but give them the control of the board—which the company agreed to do—Judge Norton, in delivering the opinion of the court, says: "There is nothing inconsistent with the utmost good faith in . . . these stipulations. The

requirement that they should have the control of the company . . . might well have been insisted on because the purchase of the bonds, if made, involved and would require millions of money, and the only security which could be relied upon to save harmless those who furnished it, would be a faithful and honest application of it to the completion and equipment of the road. Hence, there was a propriety in the demand of these capitalists that they should have a controlling voice in the directory in order that the money furnished might be thus applied and result in giving them ample security for their investment in the bonds."

As a matter of fact, agreements for electing a contracting party to a directorship, or even to give them the control of the board of directors, are matters of every day experience in the transfer of corporate rights and in large investments in corporate funds. Indeed the contract made by the defendant in this very case for the sale of the western railway to the Atchison Road contains such a provision—a conclusive proof that the defendant's officers and lawyers regarded a provision of that kind as quite legal. (R. p. 9, ll. 46-50, p. 10, ll. 1-3.)

Other cases might be cited, but the objection of the defendant rests so much on the *result* of this provision as placing the plaintiff in a peculiar relation to the company, and thereby affecting its rights to contract with him as agent, and his rights to contract with the company on that subject, that it is necessary to consider only this latter contract of agency.

The Contract for Services and Compensation as Agent.

A.

The Subject Matter of the Contract.

It is unnecessary for the plaintiff to take upon himself the burden of showing affirmatively that the *subject-matter* of this contract is within the general scope of the chartered powers of the corporation itself. Both this court and the courts of England have laid the burden of proof upon the party who denies the power of the corporation to contract.

As long ago as 1859, Lord Wensleydale stated the law of England in advising the House of Lords in the case of

Scottish North-Eastern Ry. Co. v. *Stewart*, 3 Macqueen, 382, 415.

"There can be no doubt that a corporation is fully capable of binding itself by any contract . . . except when the statutes by which it is created or regulated expressly or by *necessary* implication *prohibit* such contract between the parties. *Prima facie all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided.*"

Mr. Justice Swayne stated the law in this country in the case of

Railway Co. v. *McCarthy*, 96 U. S., 258, 267, 1877.

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, *be presumed to be valid. Corporations are presumed to contract within their powers.*"

The subject-matter of this particular contract was not only not "necessarily beyond the scope" of the chartered powers of the corporation, but it was most necessarily within it.

The agreement was in substance one by which the defendant appointed the plaintiff one of its officers and agents, and determined the amount of pay which he was to receive. Nothing is more self-evident than that every corporation may, nay, must appoint the officers through whom it is to act, and determine their compensation. If this subject be not one upon which a corporation has a right to contract, no corporation can exist outside the leaves of its charter.

In considering the general contracting power of a corporation, Mr. Chief Justice Waite, in

Chicago, Burlington & Quincy R. R. Co. v. *Iowa*, (94 U. S., 155, 161, 1876,)

speaks of it as a "power to contract, in reference to its business, the same as private individuals, . . . subject, nevertheless, at all times to such rules and regulations" as the general legislative body of the State of its incorporation "might from time to time enact and provide."

The general legislature of Illinois, the State under which the defendant is incorporated, not only lays no restriction upon this general contracting power in the matter of securing officers, but

expressly authorizes their appointment, as has been previously shown. (Supra p. 5.)

The defendant had evidently a right to make *some* contract with the plaintiff for his services, if it had need of them.

This right of the corporation to secure proper officers of course included the right to have, as its acting agent in the Boston Office, one who was also a director of the company. The executive officers of a corporation are usually taken from among the directors, and to be a director is commonly regarded as a prerequisite to office, rather than as a disqualification for it. Here the company had selected as its president, vice-president, secretary and treasurer men who were all directors, and analogy would certainly point out that the assistant vice-president should also be a director.

Indeed the plaintiff understands that this right is not questioned —is in fact admitted by the Court in its ruling—and farther consideration of the point is therefore omitted.

Equally evident is it that the defendant must have power to provide for the compensation to be made to the plaintiff if he rendered these services.

The directors of a corporation frequently serve without pay, but it is common knowledge that the active executive officers of a business corporation customarily demand to be paid for their work, and are paid for it.

It is not as director that the plaintiff claims any payment. His claim under the contract is for his services as "manager" of the Boston Office, or as the "Boston Agent."

There is no hint in the whole transaction that he proposed or was expected to serve the corporation without direct compensation. The negotiations opened in October, 1878, with an offer to pay for the plaintiff's services if he would work for the company, (R. pp. 22-23,) the offers of payment continued throughout the whole year and a quarter that followed, (R. p. 24, ll. 30-38,)* and the transactions

* The word "nearly" in line 30 of page 24 of the printed record is evidently a mistake for "over." The negotiations began in October, 1878, (R. p. 22,) and ended in December, 1879. (R. p. 28.)

closed in December, 1879, with a definite written provision for payment.

There is no pretence, even in the pleadings, that the appointment to the position of director was to take the place of salary. The terms of the written agreement would themselves contradict such a suggestion if it were made. It is impossible to claim that the provision for becoming a director even affected the question of compensation, or diminished its proposed amount, or was ever suggested as a ground for diminishing it. A careful examination of the whole history of these transactions, as given in the printed record, shows that the defendant's president began by offering "one-third the gross commissions," (R. p. 23, ll. 8, 17,) as the measure of the compensation proposed; that he continued during the whole of the negotiations to offer "one-third of the gross commissions," (R. p. 24, ll. 34-38,) and that the transactions were finally closed by a contract giving the plaintiff the same "one-third of the gross commissions." (R. p. 11, ll. 1-13.) For it is to be noted here in passing—as shown elsewhere more in detail (infra, pp. 30-33,)—that the contract of 17th December, 1879, gives the plaintiff, in payment for his services, what was originally proposed to him, viz., one-third of the gross commissions on business done through him; this third, however, being guaranteed to amount, during the year, to not less than $1,800. The form of statement may vary but the fact remains that the plaintiff received at the end of the fifteen months of negotiations substantially the same compensation that had been offered him in the beginning, before there was any suggestion of his becoming a director of the company. For there was no proposal that he should enter the directory, or even become a stockholder, at the early interviews, (R. pp. 22, 23, 24,) nor indeed till nearly the close of the negotiations. (R. p. 27, ll. 16, 38.)

From whom the suggestion that he should become a director first came does not appear, but the first mention of the subject is made, as already stated, in a letter from Mr. Short of 11th November, 1879, (R. p. 27,) only five weeks before closing the agreement. The whole history of the transactions points to Mr. Short as the probable source of this, as of the first proposals. From whomsoever it came, however, it evidently did not affect the amount of compensation offered. The transactions closed, as they began, with

an arrangement for payment based on the amount of earnings gained through the plaintiff or through the plaintiff's office and department. Other terms are considered, but the plaintiff "thinks more favorably of the commission than the salary," (R. p. 25, ll. 46-47,) and the system of payment by commission is adopted in substantially the same form as originally proposed.

Evidently the plaintiff was to become not only an officer, but a paid officer. The fact that the plaintiff was also to become a director clearly could not prevent the corporation from agreeing, in advance, to pay him. Nor could it, even had he been already a director at the time of the contract. There is some conflict in the cases as to the right of active executive officers of a corporation, who are also directors, to recover pay for their services *in the absence of a previous contract* by the corporation to pay them, or of a vote or resolution equivalent to such a contract. But they are unanimous in *admitting a right in the corporation to make such a contract beforehand*, or to pass such a preliminary vote or resolution.

In speaking of a director who accepts an active executive office, Mr. Justice Walker says, in delivering the opinion of the court, in

Cheeney v. *The Lafayette, Bloomington & Mississippi Ry. Co.*, (68 Illinois, 570, 574, 1873,)

"No person is under the slightest compulsion to accept the position, and if he is unwilling to do so without compensation, public policy requires that his compensation should be *fixed and certain before he enters upon the discharge of the duties of his office.*"

In *Loan Association* v. *Stonemetz*, (29 Pa. St., 534, 535, 536, 1858,)

where a resolution for compensation to a director for certain services had been passed *after* the services had been rendered, Mr. Justice Porter, in delivering the opinion of the court, said: "The resolution . . . *wanted the essential elements of a contract.* . . . When . . . passed, the consideration had been executed, for *the services* . . . *had been previously rendered.*"

In *The Maux Ferry Gravel Road Co* v. *Branegan*, (40 Indiana, 361, 364, 1872,)

Judge Downey says, in delivering the opinion of the court:

"It seems clear . . . that if there is provision made in the law under which the corporation is organized, or in a by-law of the company, *or in a contract of the company*, by which compensation is to be made for services, it may be claimed and recovered."

In *The Santa Clara Mining Ass'on of Baltimore* v. *Meredith*, (49 Maryland, 389, 400, 1878,)

Judge Grason, in delivering the opinion of the court, says: "To entitle a . . . director of a corporation to recover for services rendered his corporation, *he must prove an express contract.*"

See also

Sawyer v. *The Pawners' Bank*, 6 Allen, 207, 1863.

In *The First National Bank of Fort Scott* v. *Drake*, (29 Kansas, 311, 317, 1883,)

the court, in speaking of a director's services to his corporation, says: "Nor can the directors, after the services have been performed, pay for such services, *unless per contract theretofore made.*"

See also

Davis v. *Memphis City Ry. Co.*, (22 Federal Reporter, 883,)

a very recent case arising in the Circuit Court for the Western District of Tennessee, decided in February, 1885, in which the right of a corporation to make such a contract is most clearly set forth. Indeed farther consideration of the cases seems unnecessary, for it is perfectly familiar knowledge that the active executive officers of a business corporation are not only usually selected from among the directors, but that these are precisely the officers who receive the salaries, the directors who are merely directors usually serving without pay. Indeed the plaintiff understands that the ruling of the learned Judge, however it be construed, must contain an implied admission of this point, and farther detailed comment on it is therefore omitted. The defendant clearly had a right to make *some* contract with the plaintiff for his pay.

The subject-matter then of the contract was within the scope of the corporation's powers.

B.

The Details of the Contract.

Of the ten specific provisions or terms of the contract one only is attacked; all the others are admitted to be harmless. This one is:— The provision for compensation.

Is this particular provision in itself contrary to law or is it necessarily an act which no corporation can undertake to do?

The words of the provision are these: (R. p. 10, ll. 40-41, p. 11, ll. 1-13:)

"The said party of the first part, hereby agrees . . . to pay to said party of the second part the sum of eighteen hundred dollars ($1,800) per year as 'salary,' together with all expenses of travel incurred by him on its behalf, and a further amount as 'commissions' to be determined as follows, to wit: All business originating in said 'eastern division,' which shall include the whole of Maine, New Hampshire, Vermont, and Massachusetts, or transacted at said Boston office, shall be 'valued' according to the amount of gross profit coming therefrom to said corporation, or which can be rightly claimed by it. After deducting from the aggregate of such profits for each year the sum of fifty-four hundred dollars ($5,400), plus the amount of book-keeper's salary, said party of the second part shall be entitled to one-third (1-3) of the balance as commissions, as above."

The first thing to be clearly understood — and it cannot be too clearly understood — is this. What we have here is *not* a provision for a fixed salary to be legally paid him for his regular services as agent, or manager, and a separate provision for a bonus to be paid to him as director, for certain other acts done or to be done by him as such director. This has been the fact in some of the decided cases, and the counsel for the defendant, at the trial, not unnaturally, endeavored to give to this case the aspect of a legal salary, rightly earned as manager, and a separate illegal "bonus," * obtained as

* The cases cited by the defendant on this point, at the trial, have no bearing whatever on the case at bar. They refer to the receipt of money from persons *outside the*

director. But such is not the fact. There is but one provision for payment, and it is to be made for one class of work only. The services for which payment is to be made are all the same in kind, and to be rendered under the same conditions. They can not be severed, and the plaintiff told: "these are legal services, for these you shall be paid; those are illegal services and for those you shall receive nothing." Neither can the payment be severed. There is not an agreement for a salary of $1,800 and then a separate agreement made at a subsequent time to pay a "bonus" or "extra commission." There is but one agreement, and there is really one salary provided for in it, though the terms employed might mislead at first sight. The plaintiff never offered * and never agreed to work for the defendant for $1,800 a year. His salary was to be, not $1,800 a year, *but one-third commissions guaranteed to amount to not less than* $1,800 *a year.* This was a salary of a very different value from eighteen hundred dollars a year, as this single transaction shows.

This fact cannot be too emphatically insisted on. The complex provision of the written memorandum which defines the amount of money to be received by the plaintiff, (R. p. 11, ll. 1-13,) is in reality merely a mathematical working out in detail of the familiar provision that an agent is to receive as his pay for the work done by him a certain commission or share of the profits on that work, this commission however being guaranteed to amount during the year to not less than a certain sum, which he is to receive in any event, in order to protect him from the total loss of his time and labor in case the venture proves unsuccessful. These fourteen lines of the contract, printed above, are in reality one sentence, and are simply

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corporation for services rendered, *as director, to the advantage of these outside persons;* a transaction which is practically bribery, and of course fraudulent, but which has nothing in common with a payment by the *company* for services to the *company.*

*The words "salary, say $1,800," in the plaintiff's letter of 29th October, 1879, (R. pp. 26-27,) were used with reference to being employed "without coming under obligations"; i. e. without being compelled to risk large sums of his own or his friends' money on the chances of the company's success. The preceding letter of Mr. Short of 3d October, 1879, to which this is an answer, had required, (as does the contract finally made,) an investment of $10,000 as a condition precedent. The "salary of say $1,800" is suggested as an alternative to this demand to risk his own or his friends' money, to which the plaintiff objects throughout.

a detailed statement of the *method to be used in computing* the plaintiff's third of the gross commissions on business originating in the Eastern Division or transacted at the Boston Office, instead of a bare statement of the *principle* on which he is to be paid.

The defendant's officers might have said to the plaintiff: "Inasmuch as you prefer (R. p. 25, ll. 46-47,) the system of payment by commission your salary shall be based on one-third of the earnings of your office; but as the business is new, and the sales may be small at first, we agree that this third shall not be less than $1,800 in the first year, in any event;" or, assuming that all this has been already said— as, of course, it had been said many times in their preceding interviews—they might, when they came to the memorandum, have simply written down in that the mathematical statement of the process by which this amount was to be ascertained. The principle was perfectly understood. It was necessary only to fix upon the method of working it out in figures. Indeed the statement of the principle, in this as in all mathematical problems, is itself contained in a statement of the method of application. For to say that the plaintiff is to receive $1,800 in any event, and also one-third of the gross profits diminished by three times $1,800, ($5,400,) is the mathematical equivalent of saying, simply, that he is to have one-third of the gross profits but is not to receive in any event less than $1,800 each year. The introduction of the provision which makes the plaintiff pay his one-third of the book-keeper's salary was probably the cause of the more complex form of statement. But, whatever may have caused the adoption of this particular form of statement, the fact remains that the plaintiff is to receive for his services in managing the "Boston Office and Eastern Division" a compensation based upon the amount of its earnings. The proportion fixed is the proportion originally offered, viz., one-third. It is guarded indeed, on the one hand, by a provision drawn in favor of the company, that in estimating the gross profits of the Boston Office or Eastern Division, the book-keeper's salary should be deducted; and, on the other hand, by a provision in favor of the plaintiff, that if the business of the company should not be so successful as Mr. Short anticipated, the plaintiff should not be called on to take less than $1,800 during the first year. But no amount of argument can ever make anything else out of this term of the contract than a provision

to pay the company's agent in Boston a salary based upon the amount of the earnings of that department, *i. e.* upon the profits on the business brought in by him.

This point is most important, because, if well taken, it seems to reduce the question to be argued to an issue so narrow as to be most surprising—surprising because it is an issue answered in the plaintiff's favor by an admission of the learned Judge himself.

If it be true,—and the preceding recital of the case and of the decisions, as well as the lack of serious attempt to dispute it, show it to be true,—that the defendant's officers had a sufficient *authorization in fact* from the stockholders to make this contract; if it be true,—and the learned Judge himself admits it to be true, (R. p. 56, ll. 3-4,)—that the corporation had a right to make *some* contract with the plaintiff for his services as agent, even though he might be also a director; if it be true,—and the cases cited above, as well as the implied assumption of the point by the Court throughout the opinion, show it to be true—that the corporation had a right to provide in this agreement for giving to the plaintiff, even though a director, *some* payment for his services as agent; if these three things are true, the only question remaining is this: was it within the scope of the corporation's power to put the plaintiff's compensation for his services as agent upon a basis regulated by the amount of the gross profits on business done by him for the corporation? The question is a perfectly simple question, and would seem to admit of no other answer than that which the Court makes in these words: (R. p. 57, ll. 31-35:) "It might be very well claimed, if this contract related merely to a commission on sales actually effected through the Boston Office by the plaintiff, or actually originated and perfected within the four New England States embraced by the contract, that *it would not be an unreasonable one.*"*

As this is precisely what the contract does relate to, it would seem as if the Court had by its own words disposed of the only objection to upholding the contract. But as the learned Judge cannot have really intended to answer this question in the affirmative, and must, indeed, have answered it in the negative to have reached the decision which he made, the plaintiff can only present this state-

* Certain provisos which follow here are considered farther on, (infra. p. 40.)

ment of the Court as indicating his assent to the soundness of the general principle of paying agents on the basis of a commission, or share of the profits, on work done by them, or in their department, and proceed to consider in detail the particular objections found by the Court to applying this principle to the case of the plaintiff.

The most careful study of this ruling will fail to show other than the following grounds of objection taken by the Court to the validity of this provision for giving the plaintiff "one-third of the gross profits on business originating in the Eastern Division or transacted at the Boston Office."

(*a.*) That the *amount* of compensation provided by this method is "excessive," or "enormous." (R. p. 57, l. 38.)

(*b.*) That the contract must be judged by its *results*, and that the results were not such as the Court can approve.

(*c.*) That this provision was one "affecting injuriously the rights of *stockholders*" and "affecting the general prosperity of the corporation." (R. p. 57, ll. 24, 36.)

(*d.*) That it was "without regard to the rights of *creditors*," "giving him a profit without regard to the liabilities," "without regard to the debts or other liabilities of the company," and "affecting the general solvency of the corporation." (R. p. 57, ll. 26-27, 16-17, 36-37.)

(*e.*) That the contract as a whole is "*unreasonable*," "not reasonable or fair." (R. p. 57, ll. 23, 24, p. 58, ll. 2-3.)

a.

The Amount.

The Court considers the *amounts* called for by the plaintiff's contract as excessive; it speaks of them as "enormous," and evidently regards this as one element tending to show that the contract was invalid. Assuming, as of course must be assumed in treating this view of the case, that the transaction ending in the sale of the western railroad was business "originating in the Eastern Division or transacted at the Boston Office," and called for a payment to the plaintiff of upwards of $25,000 under his contract, the Court finds in

this a strong argument to show that a contract, calling for such an "excessive" compensation to the person who brought in the business to the company, must be one which a court of law "cannot sustain." It is of course the unquestioned duty of the court to see to it that no stockholders of this or any other company are imposed upon by an unlawful contract, but it is equally the fixed maxim of the court not to interfere with the freedom of contract. If a man with clear senses and in full possesson of all the facts of the case chooses to pay a certain price for a thing, it has always been regarded by the courts as evidence of what he considered the thing to be worth at the time, rather than as a ground for relief if he finds his own estimate to have been excessive. It has long since passed into the region of undisputed law that excess in consideration is no ground for rescission, or relief, except as it is *an element tending to show concealment of facts, imposition and other forms of actual fraud.*

In this case the question of actual fraud is set aside at once by the positive finding of the court, (R. p. 56, ll. 19-21,) that there is "no evidence . . . from which to infer . . . any purpose to perpetrate a fraud."

That there was no concealment of fact is almost too self-evident to need statement. The nature of the subject precluded such a thing. The past history of the corporation was of course known to all of the defendant's officers, and the plaintiff certainly had nothing to conceal. The future was a pure matter of speculation to all alike. The defendant's officers certainly had the best means of estimating the future value of their own business. If they underestimated the amount of business which the plaintiff was to succeed in bringing in to them, the surprise cannot have been other than agreeable.

They certainly did not act hastily. The negotiations were prolonged over a year, and their last act before signing the contract was to retire for a final consultation.

The provision giving one-third commissions was identical with the first offer made by their president, fifteen months before, and kept open during the whole time. If their sober second thought should have told them the offer was too large, this thought should certainly have come to them at some time during this long period.

To suppose that the defendant's officers were "overreached" by

the plaintiff is to fail to read the character of Mr. Short, as that gentleman writes himself down, not merely between, but in the lines of his letters to the plaintiff during the transactions of May and June, 1880. No one could rise from a reading of these letters, in which he sees throughout the keen shrewdness of Mr. Short, now rebuking the plaintiff for his too great honesty and openness, reminding him to be "wise as a serpent," (R. p. 45, l. 27,) disclosing his own principle of action by telling the plaintiff that "where a direct negotiation is pending between parties everything not necessary to be disclosed should be kept back"; (R. p. 45, ll. 22-23;)—no one can turn away from this glimpse behind the scenes of Mr. Short's mind, as shown in unrestricted intercourse, and regard the idea of his having been "imposed upon" by the plaintiff, in a matter of price, with anything but an amused sense of its absurdity.

The reasoning of the Court evidently proceeds, in treating this point of the case, upon the ground that the compensation which this provision entitles the plaintiff to receive, is so "enormous," that it is clearly beyond what the parties could ever have meant to provide for; that there was really no meeting of the minds as to such a contingency as has now arisen, and that therefore the defendant should be relieved from the contract as having been executed under a mistake of fact, and really not a contract at all. For it can not be supposed that the Court intended to question the right of Messrs. Short, Debevoise and Watson, directors, officers and majority stockholders of the defendant corporation, to pay any price they saw fit for the plaintiff's services, provided only they understood what price they were paying, and considered it for the best interest of the corporation to pay it. Their full authority to do this has been amply shown above, (supra, pp. 5–17,) and if they really understood what they were paying, the simple fact that they paid this price for the plaintiff's services, after attempting to secure them on substantially the same terms for more than a year, is in itself the best possible proof that they considered the price one which it was for the interest of the corporation to pay. If they had not regarded it as a good thing for the stockholders they certainly would not have paid it, for the interest of these three men in the success of the company exceeded, by nearly nine to one, the interests of all other stockholders put together. And it is perfectly clear that they did under-

stand what they were paying. They were all business men, and knew the meaning of doing business "upon commission," and that, the *rate* of commission once established, the *amount* to be paid or received was a simple matter of arithmetic, and might lie among the units, or mount to the hundred thousands, according to the volume of business done. In fact none knew better than they what it meant, and might involve, for their own business was one conducted upon a "commission" basis. (R. p. 22, ll. 37-38, p. 35, ll. 42-50.)

Not merely did the defendant's officers know what payment by commissions involved, but the company distinctly announced, more than a year before, when offering one third commissions, that its general policy was "to encourage people, by offering this *liberal commission*," (R. p. 22, l. 48,) and that it was done deliberately because it was "thought that in the end the earnings of the company would be very much more considerable under that policy than if the company sought to retain a larger share of the commissions for themselves." (R. p. 22, ll. 49-51, p. 23, l. 1.)

The Court evidently regarded it as impossible that this policy could have ever been supposed by the defendant's officers to apply to commissions so large as the sum claimed by the plaintiff in this suit. But the Court was evidently more conservative in its views than were Mr. Short and his fellow officers. There is no evidence that that gentleman ever made the slightest objection to the plaintiff's claim on account of its amount, or based his objection to it on the ground that the contract was not intended to apply to commissions on transactions of that magnitude. He did indeed dispute the plaintiff's claim earnestly. In fact he evidently foresaw, as early as the 6th of June, 1880, that, if the business were completed, the plaintiff would be entitled to claim one-third of the commissions, and his statement in the letter of that date, (R. p. 46, l. 37,) "that Mr. Strong instigated the negotiations in the first instance"—a statement totally irrelevant, for no one had mentioned the subject or inquired who instigated the negotiation—shows both that Mr. Short and his associates foresaw that the plaintiff would have a claim, and that he was "hedging" in order to thwart it if he could. But the ground on which they disputed the plaintiff's claim, both at this time and at the subsequent meetings at which it was so fully discussed, (R. p. 53, ll. 44-47, p. 54, ll. 1-3, p. 55, ll. 17-29,) was not

that the contract did not apply to claims of this magnitude, but that the transaction in question was not in fact "business originating in the Eastern Division or transacted at the Boston Office;"—a question of fact which the plaintiff is quite content to submit to a jury.

The Court is apparently of opinion that behind this question of fact is another which should be treated as going to the whole root of the matter, viz.: that the stockholders never had in mind transactions of such magnitude, or a division of such an "enormous profit" in the proportion of one-third to the agent and two-thirds to the principal. But what in fact did Mr. Short and his co-directors—the men who owned nine-tenths of the stock and were therefore safely intrusted by the holders of the other tenth with the care of the whole—what in fact did these men have in mind as to the possible, or probable, magnitude of the commissions that were to be earned and divided? A single fact on this point is more conclusive than any possible supposition, and fortunately the plaintiff can show in Mr. Short's own words what scale of transactions he and his co-directors contemplated and what they meant by the "liberal policy of the company."

In his letter of the 10th of May, 1880, Mr. Short speaks of the railroad and hotel enterprises on Long Island, and says: "we would like to have some of your folks go over the line and see for yourselves. I think it would result in the placing of a million of the bonds in Boston. *I do not see why that would not make the Boston office comfortable*, and at the same time pile up our dividends." Now the lowest rate of commissions anywhere mentioned as earned by the company is two per centum, (R. p. 54, l. 23,) and it appears that even on large transactions it rose as high as ten per centum. (R. p. 43, l. 11.) At the lowest rate, the commissions of the company on this single transaction of the Boston Office would have been $20,000; at the higher rate, $100,000; thus giving to the plaintiff as his share in one case over $5,000, in the other case over $30,000; the latter sum considerably exceeding the amount of the plaintiff's share of the profits admitted in this suit. Yet in speaking of this single transaction, which would yield the plaintiff from five thousand to thirty thousand dollars compensation, Mr. Short dismisses the consideration of the plaintiff's share as merely a "comfortable" return for his work.

Evidently there is no possibility of holding the contract unreason-

able on the ground of the magnitude of the plaintiff's possible earnings on "business originating in the Eastern Division or transacted at the Boston Office." All the defendant's officers and directors and the owners of nearly the whole of the stock perfectly understood what these earnings might amount to and yet thought it extremely desirable for the company to secure the services of the plaintiff on the basis of a salary measured by those earnings.

It may be urged, that, although the defendant had a right to pay as large a sum of money as it chose for the plaintiff's services, yet that the plaintiff had no right to receive so large a sum from the corporation in which he was a director. This may have been the shape which the objection to the amount of the payment took in the mind of the Court. The objection is twofold, and each form admits of a separate answer.

If the objection be to the actual receipt by a director of so large a sum of money from his corporation, the answer is, that the plaintiff — had he been so fortunate as to have actually received this money — would have received it at the time when he was a director, it is true, but by virtue of a distinct contract with the corporation, and that his right to receive it depends entirely upon the validity of that contract. If he had a right to the contract he had as much right to the money it called for as he had to his dividends.

If on the other hand the objection mean that the plaintiff had no right to take such a valuable contract from the corporation, the answer is—and it is an answer that goes to the root of the corporation's whole defence—that the plaintiff was *not a director when he took the contract*. He was then under no obligation whatever to the corporation, he was in fact in the position of an entire stranger* to it and had a right to take as much pay for his services as the corporation thought it wise to give him. In considering elsewhere, (infra I. 3, p. 57,) the capacity of the plaintiff to contract, it will be shown that the statement of the learned Judge in the early part of his ruling that "the contract must . . . be construed in the same manner as if he was actually a director at the time of its inception,

*The testimony introduced by the defendant, (R., pp. 32--33,) tending to show previous knowledge of the company's charter and by-laws, might be competent evidence to show some knowledge, by the plaintiff, of the powers of the officers and of the company, but leaves him, of course, a stranger to the company in a *fiduciary* sense.

and as if it was made with him while he was a director," if it be taken literally, is not only unsupported by the decisions, but ignores the fundamental principle on which all the decisions rest. Indeed the learned Judge could scarcely have intended to say that the plaintiff, while still a stranger, could not sell his services to the corporation at as high a price as the corporation was willing to pay. The Court must have meant that inasmuch as the plaintiff made a separate contract for his election as director, in consequence of his investment in the stock, at the same time that he took this contract for his pay as agent, he must see to it that in *the process of carrying out* this latter contract he should not be placed in a position in which his interests as agent would conflict with his new duties as director toward either the stockholders or the creditors. This is a very different objection and will be considered in detail in discussing the plaintiff's relation to the stockholders, and the rights of creditors. (infra I. 2, c. and d., pp. 42 and 47.)

It is only necessary to point out here that the *pecuniary value* of the contract depends wholly on the terms of payment upon which the parties agreed, and that whatever value these had was settled at the moment of signing the contract. *They had been agreed upon before the plaintiff became a director*, and while he still had a right to contract with the corporation as a stranger.

b.

The "Results."

The learned Judge, in making the admission, previously quoted, that the provision for the plaintiff's compensation is reasonable qualifies it with one condition. This provision, the Court says, "would not be an unreasonable one *provided the results of it were reasonable*, not affecting the general prosperity and solvency of the corporation." It is somewhat difficult to comprehend the force of this objection and therefore difficult to answer it. If it is meant by the Court that the contract would be unreasonable if it contained provisions or *inherent elements, the necessary result of which* must

be to injure the interests of the stockholders or creditors, this is but another way of stating that a contract of this kind must tend to diminish the profits of the stockholders or work a fraud on the creditors; two objections which the Court had already passed upon in a discussion which will be treated farther on. (Infra, pp. 42-47 and pp. 47-50.) The only other meaning which can be attached to the phrase, "provided the results of it were reasonable," is, that, although the general principle of paying the plaintiff by a share of the earnings of his Boston Office or Eastern Division was perfectly legal, although all the defendant's officers and the holders of nearly the whole of the defendant's stock perfectly understood what the results of applying the principle might be, although they had ample authority to make this contract, and although they made it solely because they considered it to be for the best interests of the company to do so, yet that if, upon looking back at the company's gain or loss from the contract after it had been performed, its *pecuniary results* were not such as the officers had reason to suppose they would be, if in fact the contract turns out to be unprofitable, then it must be regarded as "unreasonable," as illegal, and therefore beyond the power of the defendant to make it. It can scarcely be supposed that the learned Judge meant to enunciate this doctrine, and yet it seems impossible to attach any other meaning to this portion of his ruling; for he goes on in the next sentence to qualify his admission of the legality of the general principle involved in paying the plaintiff by a share of commissions, by saying: "But if it is to be construed as covering transactions of this nature, where the *enormous profit* realized in this case would be divided in the proportion of two-thirds to the corporation and one-third," etc., "it seems to me to be unreasonable, and a contract that ought not to be sustained";—apparently having in mind, as the element of unreasonableness, the fact that the contract could result in giving to the plaintiff so much money for work which seems to the Court, as he states elsewhere, of so little profit to the corporation. But if this contract is to be set aside because its pecuniary results are unprofitable to the shareholders, this is, in effect, nothing short of affirming the general principle that all contracts, the results of which are profitable to the shareholders, are intra vires, and all contracts, the results of which are unprofitable to the shareholders, are ultra vires. A doctrine which would undoubt-

edly protect the interests of the shareholders in a given case, but which, it is scarcely necessary to add, has never yet been adopted by any court.

If the fact of a contract proving profitable in its results does not necessarily make it intra vires,—as was decided in

The Central Railroad Company v. *Collins*, (40 Ga., 582, 617, 1869,)

the converse of the proposition is certainly not true.

If the only objection to the contract is, as Lord Hatherley puts it in

Overend, Gurney, & Co., Limited v. *Gurney*, (L. R., 4 Ch. App. Ca., 701, 720, 1869,)

that the directory "*has not made a sound and profitable bargain*," it certainly must follow in this case as it did there, "that the *shareholders must take the consequences* of the manner in which their business was conducted by those whom they have trusted to act as their agents."

C.

The Interests of the Stockholders.

The two objections to the contract which touch its amount and its assumed unprofitable character are sufficiently answered, as has just been shown, by merely pointing out that these elements were fixed and determined by the act of signing the contract and were agreed upon by the defendant and the plaintiff while he was acting as a stranger to the company and before he assumed any fiduciary relation to it. No act was required to be done by him in his fiduciary character, as director, concerning his compensation; for that compensation must be determined by the mere mechanical application of the formula given in the memorandum to the volume of business done by the Boston agency. Indeed there was no act which he or the company, after signing the contract, *could* do to affect these elements; for any act varying them would be to vary the terms of the contract. But it is urged, that, admitting all this, there were still

some acts to be done by the plaintiff, as director, after the time of signing the contract; and that in performing these subsequent acts his own interests as agent or manager might conflict with his duties as director towards the stockholders. This is quite another question and a question that deserves careful consideration. Fortunately the answer to it is very simple.

His own interests as agent or manager were to make the earnings of the Boston Office—and therefore his own earnings—as large as possible. His duty as director was to make the earnings of the company as large as possible. Is there here any conflict? The learned Judge was of opinion that there was.

If it be meant that the conflict arises out of the fact that all compensation received by him, as agent, diminished by so much the total earnings of the company, and thereby injured the stockholders, the obvious answer is that the interest of every salaried officer in his pay does the same, but that no court was ever known to question his right to it on that ground. It would undoubtedly be a generous act in a salaried officer to refuse to diminish the earnings of his company by taking from it the salary which the company had rightfully contracted to pay him; but generosity has never yet been defined by the law as a necessary element of duty. The plaintiff has the same right to his appointed pay that any other officer has to his, and if he has a right to any of it, he has a right to the whole of it. If he has a right to his $1,800 already paid him, he has the same right to the full amount of his agreed pay.

If it be meant that some act done by him as agent, in carrying on his department, may perhaps injure the interests of the stockholders, the still simpler answer is that this is impossible, because the plaintiff *cannot work for his own interests without at the same time working for the interests of the company. He cannot earn a dollar for himself without earning two dollars for the company; and if he fails to earn the two dollars for the company he fails to earn the dollar for himself.* In other words, the interests of the plaintiff and the interests of the stockholders are identical, and the contract, instead of being unprofitable to the company, as has been previously supposed for the sake of argument, *is extremely profitable to it*, as is shown by this very case at bar. For the defendant here stands in this dilemma:—

If the transaction in this suit is *not* business brought in by the plaintiff, then the plaintiff has no claim and the jury will so decide.

On the other hand, if this transaction *is* business brought in by the plaintiff, then the defendant has received over fifty thousand dollars which it would not or might not have received if it had not made this contract with the plaintiff.

Under the former alternative, the defendant is no worse off for making the contract, for it keeps the whole profits, and is not required by the contract to give the plaintiff any part of it. Under the latter, it has received a large sum of money which it would not or might* not have received had the contract for the plaintiff's services not been made.

The only possible hope of escape from this dilemma is to allege that the contract does not speak in so many words of business "brought in by" the plaintiff, but gives him one-third commissions on business "originating in the Eastern Division or transacted at the Boston Office," and that the two phrases are not synonymous. But, as a matter of fact, this is precisely what they are. It is only necessary to review the negotiations to perceive, not only that the term "business brought in by" the plaintiff is identical in meaning with the phrase "business originating in the Eastern Division or transacted at the Boston Office," but that the latter is actually a definition of the former, and was so intended by both parties.

The bill of exceptions distinctly states, (R. p. 24, ll. 30 38, p. 23, ll. 7-9, p. 24, ll. 10-14, 28-29, 47-50,) that, during the whole time of the negotiations, the continuous offer of Mr. Short was to pay one-third commissions on *business brought in by the plaintiff*. This phrase is constantly used throughout the whole year and a quarter

* Either alternative is sufficient. The defendant introduces some evidence, (R. p. 46, ll. 33-37, pp. 39-40,) which seems intended to show that other persons beside the plaintiff were negotiating at the West and at New York for the sale of this railway to the Atchison road. If the testimony be that they acted earlier than the plaintiff, this is evidence to go to the jury to show that this business did not in fact "originate in the Eastern Division." If the testimony would only go to show that the sale would have been made in any event, through somebody, even if the plaintiff and his Office had never existed, it is irrelevant. In the first place, it can never be proved whether this hypothesis be false or true. In the second place, if it is true, the fact is immaterial. A purchaser of a horse cannot defeat an action for its price by averring and proving that he need not have bought the horse at all, because he has since discovered that some one else would have presented him with the horse if he had only waited.

of the negotiations, and this offer was the one finally accepted by the plaintiff and embodied in the memorandum of 17th December, 1879. It needs only a careful reading of the negotiations and correspondence to show that in this memorandum the parties had no intention of making a new departure, but meant only to put into formal shape the two agreements which had been gradually coming to a head between them, the one concerning the stock, the other concerning the agency. They more especially needed to define the several terms of this latter agreement, because it was the more complex; and none of its terms needed more exact and precise definition than the phrase "business brought in by" the plaintiff, which was to test his right to compensation. The principle was perfectly simple. It was without doubt the intention of the parties that a commission should be paid on business which the defendant would not have received had it not been for the plaintiff, and not to pay commissions on transactions which would have come to the defendant had the plaintiff never intervened. But to determine in each case whether the plaintiff was in fact the originating cause of the business,—in fact to determine at all what and where was the origin of a complicated transaction consisting of many steps,—was a very different matter.

To have allowed the phrase "business brought in by" the plaintiff to be inserted in the memorandum would have simply been to lay the foundation for a dispute of fact over every transaction that might arise. This the parties evidently perceived and equally evidently intended to avoid. It is clear that the defendant's officers said to the plaintiff, in effect: "The first use of any written words being to state our meaning, let us first of all define what we mean by 'bringing in business.' It may consist in transacting business which some one else has originated, but which would have remained uncompleted, had it not been for your intervention; it may consist in originating some negotiations which may fall, indeed, to some one else to transact and complete, but which never would have come to us except for your intervention. Be it understood then, in the first place, that we mean both 'business transacted' and 'business originated' by you. Next let us define the term 'Boston Office.' Let it be understood that we mean by those words not merely the space within the four walls of our room, but the whole territory placed under your charge, which 'shall include the whole of Maine,

New Hampshire, Vermont and Massachusetts,' (R. p. 11, ll. 5-7,) and shall also be 'designated as the Eastern Division.' (R. p. 10, l. 44.) This territory shall be under your charge, and as we have expressly agreed (R. p. 11, ll. 20-22,) not to interfere with you in that territory and to allow people to deal directly with you, (R. p. 11, ll. 21-22,) let it be farther understood that we assume that all business transacted there, (though originating elsewhere,) or originating there, (even if finally transacted elsewhere,) will have been transacted or originated by you; and that on all such business,—in a word, on all 'business originating in the Eastern Division or transacted at the Boston Office, (i. e. in the Eastern Division,')—you shall have one-third commissions. We will not attempt to inquire *who* has done the work in each case, (for we will each do all we can,) but we will regard that question as answered by showing *where* the work was done. This will avoid all dispute, and your salary as agent will be easily determinable." That all this was in substance said by the parties is as plain from the bill of exceptions as if it were reported there in as many words. And when the parties have themselves defined what the terms used by them mean, the court knows no better definition.

In the words of Mr. Justice Swayne in

Whitney v. *Wyman*, (101 U. S., 392, 396, 1879,)

"As the meaning of the law maker is the law, so *the meaning of the contracting parties is the agreement. Words are merely the symbols they employ* to manifest their purpose."

There is evidently no escape for the defendant from the dilemma on this ground.

If it be alleged that, even admitting all the pecuniary interests of the plaintiff and the pecuniary interests of the company to be identical, yet that it is impossible to say that no case can be imagined in which the plaintiff's interest in his agency *might* not be in some way opposed to the interests of the whole, it can only be replied that to conceive such a condition requires a stretch of the imagination, and that even if it can be conceived, "de minimis non curat lex." The interest of every salaried officer is always opposed to that of his com-

pany once a year in a vote upon his salary; every officer is interested against every proposition which will tend to belittle or degrade his office. If to take office means to abandon all rights, no honest man will become an officer, and the best interests of stockholders, instead of being protected, will be injured. "Such a doctrine," as Mr. Justice Miller says in Twin-Lick Oil Company *v.* Marbury, "while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the necessity of that aid."

Evidently the stockholders of the defendant company have never been and never could be injured by this contract, and the learned judge failed entirely to comprehend the facts when he supposed the interests of the plaintiff and of the defendant to be opposed.

As there were no losses on the business of the Boston Office, (R., p. 36, ll. 28–30,) and none were contemplated anywhere under a commission business, where "the mere handing over a bond . . made a profit of some amount," (R., p. 35, ll. 43–44,) the fact that the plaintiff is to have a share of the gross profits instead of the net profits is immaterial. ~~They seem to have been~~ the same in this case.

d.

"The Rights of Creditors."

Very little needs to be said under this head. To any objection to the contract based on the rights of creditors, the answer is twofold.

First, There are no creditors.

Secondly, If there were any, in this case they have no rights.

There are no creditors, simply because the bill of exceptions contains no evidence that the company had creditors, (save the plaintiff,) and there can be no presumption that there were any. On the contrary, what evidence there is on the subject points the other way. The company paid large dividends from the "general earnings of the company" during the time covered by the plaintiff's contract, and afterward. As all general earnings of the company are, by law, first applicable to the payment of debts, the presumption would be, either that the creditors had been paid, or that there were none to pay. Be that as it may, the important fact here is that *no creditor*

appears in this case, and it is difficult to understand what the learned Judge means by the "rights of creditors" in a case where no creditor appears to claim any rights.

But even if a creditor should appear to sustain the objection suggested by the Court, it is perfectly clear that he has no rights which he could enforce.

If in fact the contract be profitable to the corporation—and the considerations suggested under that head show that it certainly was so—*a fortiori* it was beneficial to the creditors, who take precedence of the stockholders in their claims upon the assets.

But even if it had been unprofitable, the creditors would have no right to complain on that ground, so long as the corporation was solvent—and on the question of solvency there ought not to be much doubt, since the company paid, at the time of these transactions, over seventy per cent in dividends in one year.

In *Mills* v. *Northern Railway of Buenos Ayres Company*, (L. R., 5 Chan. App. Ca., 621, 628, 1870,)

where a plaintiff, who claimed to be a creditor, endeavored to restrain the company by injunction from carrying out certain proposed transactions, on the ground that they were impairing the funds from which he was to be paid, Lord Chancellor Hatherley, in refusing the injunction, says: "It is wholly unprecedented for a mere creditor to say, 'Certain transactions are taking place within the company, . . . and . . . I am entitled to come here . . . to see whether or not they are doing what is ultra vires, and to interfere in order that . . . I may keep the assets in a proper state of security for the payment of my debt whensoever the time arrives for its payment. . . . Certainly within the last twenty or thirty years the money due to creditors must have been many millions, and the number of creditors must have been many thousands; yet I have never before heard—and I asked in vain for any such precedent—of any attempt on the part of a creditor to file a bill of this description against a company, claiming the interference of this Court on the ground that he, having no interest in the company, except the mere fact of being a creditor, is about to be defrauded by reason of their making away with their assets. It would be a fearful author-

ity for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom."

Even if the corporation were insolvent it does not follow that a creditor could interfere in a case like this. In the recent case of

Pond v. *Framingham & Lowell R. R. Company*, (130 Mass., 194, 195, 1881,)

where the defendant corporation was alleged to be insolvent, and where, as Mr. Justice Morton states, in giving the opinion of the court, the bill was "an attempt by a creditor to restrain his debtor from making what is alleged to be an improvident contract," the court refused the prayer for an injunction and dismissed the bill.

The only possible ground on which a creditor could base opposition to this contract is one which would apply with equal reason to any contract providing for compensation to any officer for his services; for the plaintiff here has no claim on his money to the exclusion of creditors. He stands on the same footing as other officers of the company in this respect, and neither has nor demands any lien or right of retainer. In fact, there is nothing to show that in any case the money received from business originating in the Eastern Division or transacted at the Boston Office necessarily came into the plaintiff's hands at all. It might be paid directly into the central treasury, as was done in the case at bar. But even should the money come to the plaintiff's possession, he has *no right to retain his third* and leave only the two-thirds for creditors, for the contract does not contain a word which could be construed to give him a lien on the "earnings of the Boston Office" as against the general creditors of the company. He is to receive his commissions *from the company*, after accounting with it, and at stated periods;—provisions which show conclusively that all the money is first to go into the general assets of the company, and be first applied to satisfying the "rights of creditors."

Moreover, the fact that the plaintiff is to receive a sum based, not merely on the profits actually received in hand by the company, but also on those "which can be rightly claimed by it," (although, for instance, they might be balanced by some credit or by some other transaction with third parties,) shows that no lien could have been intended on funds part of which were never to exist in specie.

The same fact also shows conclusively that this is a provision for a *salary regulated by earnings*, and not a division of earnings—a technical distinction, but an important one.

e.

The Contract is Reasonable and Fair.

The learned Judge characterizes the contract as "unreasonable" and as "not fair." These objections are of that kind which are addressed to the power possessed by a court of passing, as a jury passes, upon questions of fact which are really questions of private opinion. Whether or not the contract be reasonable and fair, turns, as the learned Judge himself says, (R. p. 56, l. 12,) upon "the circumstances" under which it was made; and the decision of that issue depends upon whether the balance of all these circumstances lies in the mind of the court finally inclined toward "fair" or "unfair." No citation of the rules of law laid down in decided cases can avail here, as in the previous discussion upon what the Court calls "the nature and terms of the contract itself," for, in deciding upon the "fairness" of the contract, the question is not upon the rules of law involved, but upon the method of applying them to the "circumstances" of the case. In deciding these questions of fact, however, a court of law has one advantage which is denied to a jury; it is permitted to know what other judges have decided upon the fairness or unfairness of cases arising under similar circumstances, and it may therefore be of some value to set out briefly both the circumstances and the decisions, in some of the principal cases involving the validity of contracts made by directors with their company, in order to see if any guiding principle for applying the law to the circumstances can be extracted from them, noting, first of all, the circustances of this particular case.

And what are these circumstances? The defendant corporation has been hitherto treated as subject to the same technical rules and entitled to the same legal rights as the Atchison, Topeka & Santa Fé Railroad itself, or any other corporation involving complex organization and widely distributed interests. But, when the circumstances peculiar

to this particular case come to be considered, a very important "circumstance" is a knowledge of the officers with whom the plaintiff contracted, who and what they were, and what was the corporation which they represented. It needs only a careful reading of the charter of the defendant company, (R. pp. 58-60,) and the letters and statements given by Mr. Short to the plaintiff on the day of making the memorandum, (R. pp. 31-32,) to gain this knowledge.

It appears that up to a date somewhat earlier than the 10th of August, 1878, (R. p. 60, l. 41,) John C. Short, William P. Watson and John W. Debevoise (R. p. 31, ll. 38-39) had carried on as copartners a business practically identical with that which was afterward carried on by them under the form of the defendant corporation. These gentlemen determined to turn their copartnership into a corporation and to transfer to this new corporation the "contracts, goodwill, business and interests" which they had previously held as partners. (R. p. 31, ll. 37-39.) Instead of becoming original corporators themselves and applying for a new charter, they found an old charter, taken out in the year 1867 (R. p. 60, l. 39) by James A. Eads and others, (R. p. 58, l. 46,) to incorporate the "Edgar County Land and Loan Company, (R. p. 59, l. 3,) a corporation chartered for an entirely different purpose from theirs, (R. p. 59, ll. 18-27,) but having powers sufficiently broad to cover the business which they wished to carry on. (R. p. 59, ll. 28-33.) Having obtained possession of this charter at some cost, (R. p. 31, l. 37,) by purchase of stock or otherwise, they proceeded on the 10th of August, 1878, to change the name of the chartered corporation to that which they wished to assume, "The New York, New England and Western Investment Company," and to elect themselves directors and officers. (R. p. 34.) They then went through the form of "fixing the capital stock" at $200,000, (R. p. 32, l. 17,) and of "investing," as directors, $112,000 (less the cost of the charter) (R. p. 31, ll. 36-37) in the purchase from themselves, as copartners, of their own "good will, contracts, business and interests." (R. p. 31, ll. 37-38.) They do not appear to have put in any money (R. p. 31, ll. 36-40) and the stock was probably divided among them (R. p. 32, ll. 6-8) in proportions corresponding to their respective interests in the partnership. Of the $118,000 (R. p. 32, l. 15) of stock outstanding on 17th December, 1879, the date of the plaintiff's contract, Messrs.

Short, Debevoise and Watson held $105,000 (R. p. 32, ll. 6-8) and the remainder, $13,000, was held by six other persons, (R. p. 32, ll. 9-14,) though whether the latter had paid for their stock or received it as a gift does not appear. In any event, not over $6,000 of this $118,000 (R. p. 32, l. 15, p. 31, l. 36) could possibly have been paid into the company's treasury, and there is nothing to show that any of it was paid in. If it were, it was evidently placed under the control of Messrs. Short, Debevoise and Watson, to be managed by them, as completely as if it had been loaned directly to the firm. The remainder of the nominal capital had not been subscribed for (R. p. 31, ll. 40-42) and remained unissued. (R. p. 32, l. 16.) It needs only this brief recital to show, not merely that Messrs. Short, Debevoise and Watson held the controlling power in the corporation, as has been previously brought out, but that *they were the corporation*. That this fact forms a "circumstance" which is to be taken into consideration by the court in deciding the case is shown by the decision of the Supreme Court of Pennsylvania in

Rice's Appeal, (79 Pa. St., 168, 204, 1875,)

where, in setting aside a contract for actual fraud on the corporation, the court inquire in detail into the organization of the company and recognize that a case of this kind is to be treated in a different manner from an ordinary business corporation, describing it thus: "This corporation was gotten up by Daniel V. Ahl and Richmond L. Jones. . . . They controlled the corporation absolutely. Ahl held a large majority of the stock originally, and elected a board of directors. . . . There was the form of an organization; there were a few outside stockholders . . . but for all practical purposes the corporation *was* Ahl & Jones."

With change of names the description would fit the present case perfectly.

With the situation of the parties in mind, and recalling the fact that there is no fraud in this case, let some of the principal decided cases be concisely stated, in parallel columns, in such a way as to bring out the leading facts, and, so far as may be, the controlling element in the mind of the court, in each case.

Cases involving the validity of dealings by directors with their corporations.

Transactions Sustained.

Merrick v. *The Peru Coal Co.*, (61 Ill., 472, 478, 1871.)

The plaintiff, the president and apparently a director of the defendant corporation, expended his own money in purchasing the notes of the corporation, in the market, from outside holders, and afterwards sued the company for the money paid. The transaction was apparently made in *good faith*.

Mr. Justice Walker, in delivering the opinion, says that the "Appellant, notwithstanding he was the president of the company, had the right, with his own funds, to purchase these notes and drafts, and when he did so he succeeded to all of the rights of the holders."

The Oil Creek & Allegheny River R. R. Co. v. *The Pennsylvania Transportation Co.*, (83 Pa. St., 160, 166, 1876.)

The railroad company agreed, through its directors, to repay a portion of the freight money on goods shipped by the transportation company.

The directors of the transportation company formed a large proportion of the directors of the railroad company. It was alleged that they had acted in neglect of the rights of the railroad company in making the contract. The contract had been *performed* and, in a suit by the transportation company for the re-

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Transactions Set Aside.

Jackson v. *Ludeling*, (21 Wallace, 616, 626, 627, 629, 1874.)

One Gordon, a single bondholder, caused the mortgaged railroad, which had cost two million dollars, to be sold at auction in haste and without notice to other bondholders.

Mr. Justice Strong says: "A combination was formed . . by some . . directors. . . These directors became avowedly *confederates* with Gordon to purchase the property . . for their own benefit." They bought the property in for $50,000, defeating a bona-fide bid of $550,000. "It is impossible to characterize this agreement as anything else than *fraudulent*."

The Wardens, etc., St. James' Church v. *The Rector, etc., Church of the Redeemer*, (45 Barbour, 356, 357, 1865.)

The vestrymen or directors of one corporation caused certain real estate of the church to be conveyed *without any consideration* to another corporation in which they were also interested as directors.

The Court say, through Mr. Justice Leonard, that the evidence "establishes the *fraudulent* character of the conveyance."

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Transactions Sustained.

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bate, it was attempted to defend on the ground that the contract was illegal from the double fiduciary relation of the directors.

But the court say: "We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. . . The defendants had enjoyed the advantages, such as they were. . . The contract was executed. . . There is no rule of law which permits them to retain both the benefits and the price."

Twin-Lick Oil Company v. *Marbury*, (91 U. S., 587, 588, 590, 594, 1875.)

Marbury, a director of the corporation, loaned money to it, and took a trust mortgage of all its assets to secure the loan. Marbury caused the mortgage to be foreclosed, and had the property bought in and conveyed to him. Four years afterward the corporation filed a bill to set aside the sale.

Mr. Justice Miller, delivering the opinion, says: "The defendant loaned the money to the corporation in *good faith*, . . and took just such security as any other man would have taken; . . there was *neither actual fraud nor oppression*. . . The evidence shows it to have been an *honest* transaction . . and . . we think it was valid originally."

The court also say the "plaintiff has *delayed* too long."

Pneumatic Gas Company v. *Berry*, (113 U. S., 322, 1884.)

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Transactions Set Aside.

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Koehler v. *The Black River Falls Iron Co.*, (2 Black, 715, 719, 720, 717, 1862.)

This was a bill to foreclose a mortgage.

Mr. Justice Davis says: "The directors were instructed . . to obtain as large a loan as they could," with power to issue a mortgage for that purpose. "Instead of honestly endeavoring to effect a loan, . . these directors . . . secured their own debts. . . The seal was *fraudulently* abstracted from the lawful custodian of it, and wrongfully affixed to the mortgage."

Thomas v. *The Brownsville, Ft. Kearney & Pacific Ry. Co.*, (1 McCrary, 392, 396, U. S. C.C., Dist. of Nebraska, 1880.)

Certain persons agreed with the corporation to build for it a certain amount of road, and took a trust mortgage of the whole railroad to secure their pay. *Before* any work was done under this contract two directors became interested with these persons in the contract for construction. Not only were these directors interested in the contract, but it appeared that all the directors of the corporation had been *bribed* to make this contract by means of a contract to relieve them from all personal liability for stock subscriptions.

Judge McCrary says: "I am unable to construe this contract as anything else than a promise to pay each member of the board individually a *consideration for his action*

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Transactions Sustained.

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One Frost was a director and also the president and general manager of the corporation. An agreement was made with him, by the directors of the company, by which he was to advance money to the corporation, then in debt, and was to receive from it what amounted to a lease of the whole property, for a term of years, to secure his advances. The corporation, some years afterward, brought a bill to cancel the lease and to compel Frost to account for profits received under it, alleging a breach of duty on the part of the directors in making the lease, and on Frost's part in receiving it.

The Court held that it was done in *good faith*, that there was *no evidence of any fraud* and that the plaintiff had *delayed* too long.

Van Cott, Receiver, etc. v. *Van Brunt*, (82 N.Y., 535, 540, 1880.)

The defendant was a director and also the president and general manager of the Hudson Avenue Railroad Company. This corporation made, through its president, a contract with a third party to build the road for a certain sum, payable in stock and bonds. This contract was immediately assigned to the defendant; who, with his associates, at once proceeded to build the road. The original contract was not made with the intention of being performed by the third party, but of being transferred to the defendant, and was promoted by the defendant, as president and director of the company, with that view. But it appeared that

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Transactions Set Aside.

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as a director, in voting for and executing the construction contract."

Rice's Appeal, (79 Pa. St., 168, 204, 205, 1875.)

One Ahl got up a corporation in which he held the greater part of the stock and himself held or controlled all the offices. By means of his control of the corporation, he made a contract with it by which he sold his own lands to the company at great profit to himself.

The court, through Mr. Justice Paxson, say that Ahl and his confederates "controlled the corporation absolutely. . . He had the company at a disadvantage, and he virtually *compels* the agreement. . . That agreement was a fraud in law and a *fraud in fact*."

Paine v. *The Lake Erie & Louisville Railroad Co.*, (31 Indiana, 283, 348, 1869.)

Certain directors of the corporation made a contract with one Oswald for the construction of the road. The bill avers that this was procured by "*fraud and collusion*," and alleges a *secret and fraudulent agreement* between said Oswald and the directors to share the profits.

This allegation is admitted by the directors, the original defendants. The court say: "It is assumed . . that the grounds of relief against the defendants are both constructive and *actual fraud*."

Abbot v. *The American Hard Rubber Company*, (33 Barbour, 578, 1861.)

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Transactions Sustained.

(Continued from left-hand column of last page.)

"the arrangement for the building of the road was made *after full deliberation and consultation*, with the knowledge and approval of all the directors and stockholders, . . . *without any intention to defraud the company or its creditors*, and in perfect good faith." (Miller, J.)

This case is particularly to be noted, not only from the strength of its general circumstances, but from the fact that the corporation was at the time insolvent, and in the hands of a receiver.

The Citizens' National Bank v. *Elliott*, (55 Iowa, 104, 105, 1880.)

In this case a director, who was also vice-president of the corporation, claimed to recover his salary under "a special contract made with the directors of the bank," whereby it was agreed that he "should receive two thousand dollars a year for his services as vice-president." The evidence failed to establish this contract, but the Court admit its legal validity, provided it be made in *good faith*.

Wardell v. *Union Pacific Railroad Co.*, (see opposite column.)

The Court set the special contract aside for actual fraud but give Wardell a large sum for his services under it, saying: (p. 339;)

"*Apart from the contract, and if it had never existed, he is entitled to a fair and reasonable compensation for his labor and time and skill. The fraud gives the railroad company no right to these without just compensation.*"

Transactions Set Aside.

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Four of the directors of the corporation, constituting a quorum, met and voted to sell the whole plant of the corporation to two men. Three of these four at the same time formed a new corporation and immediately took from these two men a re-transfer of this same plant.

The court hold that the acts are to be construed as contemporaneous, and that there was evidence of *actual fraudulent intent*.

Wardell v. *Union Pacific Railroad Company*, (4 Dillon, 330, 335, 337, U. S. C. C., Dist. Nebraska, 1877.)

The executive committee of the directors of the railroad company, through the president, made a contract with Wardell, giving him the right to take coal from its mines. A majority of this committee had a *secret interest* in this contract when it was made, and joined with Wardell and others in forming a new corporation to work the mines under the contract.

Mr. Justice Miller says: "I have reluctantly arrived at the clear conviction that it was a *gross fraud* upon that corporation." There was also both *bribery* and *original fraudulent intent*, the court saying that Wardell and his associates "knew they were getting a more advantageous contract from the railroad company by reason of the interest which the officers of that company were to have in it, and that *such was their purpose and expectation from the beginning*."

These are the decisions of many different courts, and show, in the aggregate, the opinions of more than fifty or sixty different judges on what does and what does not constitute a "reasonable" contract between a director and his corporation.

These cases have not been selected in order to support any prearranged conclusion. They are taken simply because they are apparently regarded as the chief cases on the subject, being those oftenest cited. Nevertheless certain fundamental principles of decision run through all of them.

First. In every case where there is *actual fraud in fact*, the contract is set aside.

Second. *No* contract is set aside *except* for actual fraud in fact, specifically stated, or for some bribery, concealment, original fraudulent intent, or other element showing actual *fraud in fact.*

Third. *No* contract is set aside in which there is *good faith* or where the contract, illegal or not, has been *executed.*

Fourth. *In every case in which there is good faith* and openness, the contract is sustained.

If these principles, which have guided so many judges, be applied to the case at bar, the result will be precisely the reverse of that which was reached by the learned Judge in his ruling.

3.

The Capacity of the Plaintiff to Contract.

The learned Judge makes this assumption concerning the position of the plaintiff at the beginning of his ruling: "The contract must

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If these principles, which have guided so many judges, be applied to the case at bar, the result will be precisely the reverse of that which was reached by the learned Judge in his ruling.

3.

The Capacity of the Plaintiff to Contract.

The learned Judge makes this assumption concerning the position of the plaintiff at the beginning of his ruling: "The contract must

. . be construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director." (R. p. 55, l. 49; p. 56, ll. 1-2.) Upon this assumption, as a foundation, the Court builds the whole superstructure of the reasoning upon which he decides that the contract is unauthorized and illegal. If this assumption be unsound, the whole superstructure falls to the ground.

If this statement of the Court, taken in connection with the four preceding lines of the ruling, means that the Court must look ahead to see that, in the *course of carrying out* the contract, the plaintiff's interests as agent shall not conflict with his duties to the company and its stockholders, it need only be said that this look ahead has already been taken and it has been seen that the plaintiff's interests not only do not conflict, but are identical with the interests of the company, its stockholders and its creditors.

If, on the other hand, this statement is to be taken literally, as implying an *incapacity* on the part of the plaintiff—if it be meant that the plaintiff had no greater right to bargain with the company than if he had already been a director at the time of his negotiations with Mr. Short—the assumption is so extraordinary that it is positively embarrassing to treat it; for it seems to ignore the fundamental principle upon which rests the very argument of the Court itself.

The learned Judge would himself surely be the first to admit that the case of a director is only one of a large class of fiduciary relations, such as those of agents, attorneys, brokers, factors or other persons holding a position toward another which may be expressed by the broad sense of the word *trustee*. Any one of these trustees, in dealing with his beneficiaries, is held to a stricter accountability than if he had been a stranger; in other words, his hands are tied to a greater or less degree. But why are they tied? Simply because he is, in a greater or less degree, *on both sides of the case*, and exercising force, so to speak, in two directions at once. His interest impels him to look out for himself. His duty requires him to look out for his beneficiary. And just in proportion to his power over the beneficiary, just in that proportion is there an increase in the danger that his interest may overpower his duty, and therefore

an increase in the restrictions upon his capacity to contract. In other words, this incapacity, this tying of the hands, depends solely upon the fact and upon the degree of his actual or supposed power over the cestui que trust, arising out of his fiduciary relation towards him; and this is always the ground upon which the rule is based by the decisions. Thus, in speaking of directors in

Brewer v. *Proprietors of the Boston Theatre*, (104 Mass., 378, 396, 1870,)

Mr. Justice Wells says: "If *by means of their relations to the corporate management* they secure to themselves undue advantage over their associates, they cannot retain it."

Not only is this the cause of the disability, but it is its precise measure. Thus in

Twin-Lick Oil Company v. *Marbury*, (91 U. S., 587, 590, 1875,)

Mr. Justice Miller, in speaking of the limitations of a director, says: "His obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased *in the precise degree that his representative character has given him power and control.* . . If he should be a sole director . . this obligation would be still stronger."

What possible escape can there be from the legitimate conclusion of Mr. Justice Miller's reasoning, that, if he is not a director at all, he is under no fiduciary obligation whatever? And if a man is under no fiduciary relation, that is, if he is in no sense a trustee, what possible ground is there to burden him with the obligations of a relation which confessedly does not exist? In a word, what reason is there for making this particular contract an exception to the universal rule, that, *cessante ratione legis, cessat ipsa lex?*

If then the plaintiff was not a director on the 17th of December, or during the year of negotiations which developed the terms committed to writing on that day—and he confessedly was not a director till long after that time;—if he had no shadow of control or power over the company prior to his actually becoming a director—and the notion that, while negotiating, he in any way "controlled" Mr. Short or his associates is simply preposterous;—if both these and all other necessary elements of a fiduciary relation were wanting,

how is it possible to saddle the plaintiff with any duty whatever toward the defendant during the time when this contract was being settled and drawn up, and prior to its actually going into effect? And if he owed no duty whatever to the company, if his hands were not simply not tied, but were as free as any other man's hands,—in a word, if he was an entire stranger to the company, in a fiduciary sense,—what was there to hinder him from making with the defendant as good a bargain for himself as he could, or as any other honest citizen could make? Why could he not sell his own property, viz., his services, at as high a price as the vendee would give for them, provided only everything was done in good faith and above board?

True, the moment the pen of the last signer left the paper on the 17th of December, the plaintiff was under an obligation to assume a fiduciary relation to the company; but, *prior* to that moment, he owed it no duty whatever; prior to that moment, he might have thrown up the negotiations and walked out of the office as free as the air from any fiduciary relation toward the defendant. And it was, of course, prior to this moment of signing, it was *during this time of freedom, that every term of the contract had been finally and definitely settled.* The free period and the contracting period coincide, and the contracting period nowhere overlaps the fiduciary period. This all seems so plain that one hesitates to take the space necessary to state it.

If, abandoning the untenable position of the Court, the defendant undertakes to say that the close approach of this impending fiduciary relation cast its shadow, so to speak, over the plaintiff, and hampered his freedom of action, the answer that first suggests itself is that the shadow certainly could not exist before the substance. The same offer which was finally accepted was made and considered long before there was any suggestion of assuming a fiduciary relation. Moreover, even if the two had been contemporaneous, that fact would have been immaterial.

Perhaps the readiest proof of the last assertion is to be gathered from the English cases. If, in England, the country where even to-day a trustee is presumed to give his services from love or duty toward the beneficiary and has no general right to compensation for services;—if, under the decisions of that country, a person, about

to assume a fiduciary relation, can make a valid bargain for compensation for his services which he would be totally incapacitated from making after he had entered upon the fiduciary relation;—then it will be unnecessary to pursue this objection farther. For, what a man in a fiduciary relation can do in England, he certainly can do in this country, where the English rule is reversed, and an active working trustee is presumed to be entitled to compensation, unless some special reason be shown to the contrary.

And in England the law is clear that a man may say to the proposed *cestui que trust:* "If I serve you as a trustee without a previous bargain I can get nothing; and after I become trustee I can make no good bargain for myself. Understand clearly beforehand that I do not propose to assume any fiduciary relation to you on that basis. If you wish my services as trustee you can have them on such and such terms; if you do not want them on those terms, you cannot have them at all. Let us settle all this once and for all while we are both free agents." Of course the terms must not be anything immoral; but any mere money value must be left to that freedom of contract which the law favors between persons acting on equal terms.

Thus where a mortgagee, who was also the attorney of the mortgagor, settled an account in which he charged the same poundage that a regular receiver would have charged, not having taken the precaution to make any stipulation beforehand, the account was disallowed on account of his fiduciary relation as attorney.

Langstaffe v. *Fenwick*, } 10 Vesey, Jr., 405, decided in 1805.
Fenwick v. *Langstaffe*, }

But where, some years later, a solicitor, warned by this and other similar decisions, caused to be inserted into the trust deed which created his fiduciary relation, a clause providing that he should be "authorized to receive his usual professional costs and charges as if he had not been the trustee of these presents," Lord Langdale, Master of the Rolls, allows him his full charges, saying: "There is no doubt whatever as to the law on the subject:—A solicitor, who is a trustee, is not entitled to charge for professional services which must be assumed to have been rendered in his character of trustee, *unless there be some special contract authorizing him to make the charge;*

but under a deed or contract properly entered into and expressed, he may be entitled to his professional charges as a solicitor, though he act as a trustee."

In re Sherwood, 3 Beavan, 338, 341, 1840.

A few years later, where a solicitor took precisely the position above indicated, and declined to assume the fiduciary relation except upon his own terms, declaring to his client that "if he acted for her he must act on the ordinary terms of being paid as between solicitor and client,"—a demand in which she acquiesced,—Lord Langdale, Master of the Rolls, allowed the solicitor his full charges, saying: "It is said, that it is extremely difficult for a trustee against a cestui que trust . . to make the client pay more than the rules of law allow. I will not venture to say, that in such a case as this it cannot be done, because if the parties understand the principle that a trustee acting as a solicitor in the trust matters is only entitled to costs out of pocket,—*if the cestui que trust has clear knowledge and proper protection*,—I should hardly say that such an agreement is illegal, or that it cannot be carried into effect."

In re Wyche, 11 Beavan, 209, 210, 1848.

Still later, the same principles were applied by Lord Justice Turner, in allowing to an auctioneer, who had become an assignee in bankruptcy, the *full commissions for which he had stipulated in the instrument under which he assumed that trust.*

Douglas v. *Archbutt*, 2 DeGex & Jones, 148, 1858.

That these later decisions were not due to any relaxation of the rule concerning trustees in England, but solely to the freedom of contract which exists *before* the trust relation is assumed, is shown by a comparatively late case where the Court refused to allow to a trustee, whose services were admitted to have been very valuable, the full price upon which he had agreed, or attempted to agree, with his cestui que trust *after* entering the fiduciary relation. Sir John Stuart, Vice Chancellor, says: "*A trustee who accepts the office without any stipulation on the subject*, as this trustee did, . . has no right to say, at any moment when he chooses to do so, that he will exact a certain sum."

Barrett v. *Hartley*, L. R., 2 Eq. Ca., 789, 796, 1866.

For American decisions, applying this principle to the exact question at issue, viz: the right of a person about to become a director to make a contract concerning his compensation, see the cases already cited, (Supra, pp. 28-29,) in considering the subject from the point of view of the corporation's rights.

Cheeney v. *The Lafayette, Bloomington & Mississippi R'y Co.*, 68 Illinois, 570.

Loan Association v. *Stonemetz*, 29 Pa. St., 534.

The Maux Ferry Gravel Road Co. v. *Branegan*, 40 Indiana, 361.

The Santa Clara Mining Ass'n. of Baltimore v. *Meredith*, 49 Maryland, 389.

The First National Bank of Fort Scott v. *Drake*, 29 Kansas, 311.

Manifestly the contract contained in the memorandum of 17th December, 1879, possesses all the necessary elements of validity; having been made with the full authorization of the stockholders, being quite within the scope of the chartered powers of the company, being both fair and reasonable, and conflicting with the rights of neither stockholder nor creditor, and, finally, having been entered into by parties fully competent to contract; and the learned Judge, in holding the contract to be invalid, must have been in error.

II.

CONTRACT PERFORMED AND SERVICES MUST BE PAID FOR.

The learned Judge seems to be of the opinion that if the contract of 17th December, 1879, be in any way beyond the limits allowed by law to a corporation's contracting powers,—in a word, if it be *illegal*,—this is an end of the matter, and the plaintiff can recover nothing, either under a count upon that contract, or under any kind of common count for services rendered. The decisions of the courts by no means support this view. There is some confusion of terms in the cases, but the actual decisions are overwhelmingly against the position taken by the Court.

Certain preliminary facts are clear.

First. The contract has been *fully and legally executed on the part of the plaintiff.* The bill of exceptions expressly states this fact. (R. p. 35, ll. 3-4.)

Second. The contract was made by the defendant's officers under *full authorization in fact from the stockholders* of the defendant company:—both that authorization coming from the general and implied power of agency existing in the executive officers and directors; that derived from the special mandate given them by the explicit votes of the stockholders and of the board of directors; that shown through the stockholders' acceptance of the directors' acts, by several years of acquiescence after full knowledge of the facts; and that resulting from the company's confirmation of the contract by doing all the acts required of it by the agreement, during the whole of its prescribed term, except to perform the particular act of payment here sued for. All this amply appears in the previous consideration of these points. (Supra, pp. 5-17.)

Third. The contract is *the act of the corporation.*

It was at one time supposed that, to decide whether an act *was in fact done* by a corporation, it was only necessary to decide whether or not the corporation *could legally* do it.

This assumes that what a corporation could not legally do, it could not do at all, on the ground that a corporation "can" * do

* For the double meaning of the word "*can*" as used in some of the decisions, see note to page 66, infra.

only what it is chartered to do, and being never chartered to do an illegal act, no illegal act is the act of the corporation. But since it has been established that a corporation can commit a tort—an act which no corporation is ever chartered to do—this test has broken down, and it has been admitted that a corporation may *in fact* do acts which it has no right to do, and which are illegal on that ground, but which are nevertheless done, and done by the corporation. As the court says, in speaking of a contract made by a corporation, through its officers, who were alleged to be acting *ultra vires*, in

The Oil Creek & Allegheny River R. R. Co. v. *The Pennsylvania Transportation Co.*, (83 Pa. St., 160, 164, 1876,)

"They *did* make it, and there would be a contradiction in now saying they *could not* make it, unless . . we use the word make in a different sense. . . . It is a contradiction to say they *could not*, for the fact remains they *did it*, and for some time they acted on it."

Here there is no pretence that the officers acted in their private capacity as individuals. The contract is signed with the name of the defendant corporation, by an officer having full authority to sign its name, it purports to bind the corporation, and it is executed with all due form. Whether the corporation acted within or without the scope of its charter, whether its act was legal or illegal, there is no doubt whatever that the act was done, and that it was the corporation that did it.

These three facts being established, precisely the opposite conclusion follows from that assumed by the learned Judge. Even if the Court be correct in holding the memorandum of 17th December to contain an illegal contract, it by no means follows that the defendant can escape the payment of the agreed price for the work actually done under it. Because—to pursue the simile of the court in *The Earl of Shrewsbury* v. *The North Staffordshire R'y Co.* (supra, p. 4,) —because you have been chartered to build a railway, you cannot (legally) go and build a harbor; but if in fact you have gone and dug your harbor, thereby laying yourself open to forfeiture of your charter and the penalties for your illegal act, it by no means follows that you can use your liability to the chartering power as a sword to defend yourself against the men who have done your digging. It

may well be that a contract for the digging would be entirely illegal, and, so long as it remains executory, could not be specifically enforced by either side, nor could damages be recovered for its total non-performance. But when the illegal contract has not only been made but performed, when the harbor has been in fact dug, it is too late to say, simply, that the corporation's act in contracting for it was illegal; it is too late to inflict the full punishment for the company's illegal act, for it cannot be done without at the same time punishing the innocent workmen. Owing to the confusion introduced by the various meanings of the phrase "ultra vires"* the double sense of the word "can," and the failure to distinguish between a contract which is illegal and a contract which is void, the cases, while they agree that the workingmen can recover for their services, differ as to the form of action under which they should sue.

Some cases take the view that an illegal contract is *voidable* only, and, not having been avoided while it remained executory, cannot be avoided after full performance, thus becoming in effect valid. Under this view, the agreed payment may be recovered for the services rendered under it upon a special count on the express promise to pay contained in the contract itself.

See *Kelley* v. *Newburyport & Amesbury Horse Railroad Co.*, 141 Mass., 496, 1886.

Other cases take the view that an illegal contract is a *void* contract, *i. e.*, that there is no contract at all, and hold that payment

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* The use of these words has been hitherto carefully avoided by the plaintiff because of this multiplicity of meanings attached to the phrase. The words "ultra vires" are used by the courts in at least three distinct senses in their decisions; viz, as meaning:—

Beyond the powers given by the stockholders to their agents;

Beyond the powers given by the chartering body to the stockholders;

Beyond the actual physical powers of the corporation, *i. e.*, of the stockholders.

The phrase "unauthorized" seems to well describe a contract falling under the first meaning, and "illegality" one falling under the second, and these words have therefore been hitherto used exclusively, except when quoting, because only these first two meanings of ultra vires have been involved in treating the *validity* of the contract. But in treating the effects of the *performance* of the contract it is impossible any longer to avoid the use of a phrase so constantly employed by the courts.

By the double meaning of the word "can,"—a word which may refer to either the second or the third meaning of ultra vires,—still farther uncertainty is introduced; as, for instance, by Vice-Chancellor Kindesley's expression, "you *cannot* make a harbour."

for the services rendered under it must be recovered on a common count on an implied promise to pay; giving in evidence, if necessary, the *fact* of making or attempting to make the contract as evidence to show a request for the services, and the *fact* that a certain price was fixed upon as the best evidence of the value of the services.

But with this single difference of method in arriving at a common end—a difference which to the plaintiff is perfectly immaterial, for either view of the case equally supports his claim—the authorities are unanimous in declaring, in one form or another, that *the services must be paid for*. The authorities are so unanimous on this point that the plaintiff will cite only those from the State of New York, the state where the contract was made; from Illinois, the state by which the defendant was chartered; and from this court, where the case is now pending.

In *The Whitney Arms Company* v. *Barlow et al.*, [Trustees of the American Seal Lock Company,] (63 N. Y., 62, 69, 70, 1875,)

the question turned on the liability of the Lock Company to pay for certain goods made by the plaintiff corporation and delivered to the Lock Company under a contract which was admitted to have been beyond the contracting powers held by the plaintiff corporation under its charter. Judge Allen, in giving the opinion of the court, says: "Whether the contract as originally made was ultra vires is not a very important inquiry at this time. If it was, the *State under whose sovereignty it dwells . . . has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed* and a work fully accomplished, whatever may be its right to annul its charter. . . . Here, as between two corporations, . . . the contract has been fully performed by the . . plaintiff . . and the Seal Lock Company has received the full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. . . . . The plea of ultra vires should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance jus-

tice, but on the contrary would accomplish a legal wrong. . . One who has received . . the full consideration of his engagement to pay money, either in *services* or property, cannot avail himself of the objection that the contract thus fully performed . . was ultra vires."

This is applying the doctrine in favor of an executed contract made ultra vires of the *plaintiff*. *A fortiori* must it apply in favor of a plaintiff where it is the defendant which sets up its own illegal act as a defence. Indeed the court seems to regard this latter form of the doctrine as beyond question, saying: "It is now *very well settled* that a corporation cannot avail itself of the defence of ultra vires when the contract has been, *in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract.*"

This case also shows that not only money received and goods delivered, but *services rendered*,—in a word any ground for a common count,—gives the plaintiff a right to recover.

In *Bradley* v. *Ballard*, (55 Ill., 413, 419, 1870,)

Mr. Chief Justice Lawrence, in delivering the opinion of the court, says: "While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation *in advance* from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, *to enforce against them contracts, though ultra vires, of which they have received the benefit.*"

In *Darst* v. *Gale*, (83 Ill., 136, 141, 1876,)

Mr. Justice Scholfield, in delivering the opinion of the court, says: "The doctrine seems to be settled by the weight of modern decisions, that a private corporation can not avail of the defence of ultra vires where the contract has been, *in good faith, fully performed by the other party*, and the corporation has had the benefit of the contract and the performance."

In *Planters' Bank* v. *Union Bank*, (16 Wallace, 483, 499, 500, 1872,)

where the sale of Confederate bonds and the disposal of their

proceeds were passed upon, Mr. Justice Strong, in delivering the opinion of the court, says: "It may be that no action would lie against . . . the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; . . . the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it *has been executed* by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied."

See also *Brooks* v. *Martin*, 2 Wallace, 70, 1863.

The case of

Pearce v. *The Madison & Indianapolis R. R. Co. and The Peru and Indianapolis R. R. Co.*, (21 Howard, 441, 444, 1858,)

is a good example of the different treatment given by this court to contracts made ultra vires, when executed, and when executory. The two defendant companies had undertaken to consolidate and assume the name of the Madison, Indianapolis and Peru Railroad Company. This new company made a contract to purchase a steamboat and the steamboat was delivered to the company and used by it. The contract was thus executed on the part of the vendor, and, under the above cases, had the contract provided merely for the payment of the price, he might have either sued on the express contract for the price, or upon a common count for goods sold and delivered. Instead of this, however, the vendor received, apparently in pursuance of the original agreement, promissory notes for the price of the steamboat, signed with the name of the *Madison, Indianapolis and Peru Railroad Company*. He thus held two remedies; one under the original executed contract for goods sold and

delivered, one under a new executory contract contained in the notes. He parted with the executory contracts by endorsing them to an endorsee, (who had notice of all the facts,) but he did not transfer to this endorsee his own personal rights under the executed contract to sue for goods sold and delivered. The endorsee sued on the executory contracts, viz., the notes. The court decided that the two companies could not form a new company, in other words, that the *maker of the notes did not exist;* but not content with resting the case on this, the court go on to show that the contract to purchase the boat, and the contract in the notes, are all ultra vires, or beyond the scope of the companies' powers, and the contract in the notes being *executory*, refuse their aid in enforcing it. But lest they should be misunderstood, they point out distinctly that the plaintiff held *no rights under the executed contract*, saying, through Mr. Justice Campbell, "It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible. It is enough to say, in reply to this, that *the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes*, as an endorsee; and the only question is, had the corporation the capacity to make the contract." Thus clearly implying that, had the original vendor sued on his rights acquired under the executed contract for goods sold and delivered, he could have recovered.

Not only does this court hold to the clear distinction between executed and executory contracts, but it shows that it founds the distinction on the fact of the execution, by requiring the contract to have been *wholly* executed so far as the work to be done under it is concerned. This is shown by the case of

Thomas v. *Railroad Co.*, (101 U. S., 71, 86, 1879.)

Here a lease of a railroad for twenty years, made illegally for want of corporate powers, was revoked by the corporation after running for four or five years. It was attempted to use this *partial* performance to bring it under the rule as to executed illegal contracts, but Mr. Justice Miller, while confirming the general rule as to executed contracts, points out that, so far as this contract had been executed, full payment had been made, and shows that what is asked in the suit is damages for the total non-performance of that portion of the

The very late case of

Pennsylvania R. R. Co. vs. *St. Louis, Alton and Terre Haute R. R. Co.*, (118 U. S., 290, 316–318,)

seems to adopt the view that a contract beyond the scope of a corporation's chartered powers is actually void. But in that case, apparently the latest on the subject, the court expressly affirms the principle here urged as "a principle very sound in its application to appropriate cases. . . Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract."

In speaking in this case (p. 316) of a "class of cases which hold that where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such a contract," Mr. Justice Miller cannot have intended to impair or question the force of his own previous decision in *Wardell* v. *Union Pacific Railroad Co.* (cited supra, p. 56,) in which he held that *services rendered* under such a contract were to be paid for at their fair value as well as other property received. Indeed no class of property passes so irrevocably from the possession of the owner to the recipient as personal services. Money may be repaid in kind, and real or personal property may be reconveyed, but time and services are utterly lost to the owner unless they are paid for by the person receiving them. The earlier decision of Mr. Justice Miller is the more marked because the contract was in that case not merely void because it was ultra vires, but because it was tainted with actual fraud in fact.

The court in *Pennsylvania R. R. Co.* v. *St. Louis, Alton and Terre Haute R. R. Co.* does not intimate the ground for the doubt expressed on page 318 as to the right of the Pennsylvania Road to recover on a *quantum meruit* for the past use of its road by the defendant, but it is evident that the doubt must arise from the obvious objection that the thing received, viz.: the use of another railroad, was something which the defendant's charter did not enable it to receive; an objection which, of course, cannot apply to the services of the plaintiff in the case at bar. Services in getting purchasers are not merely lawfully received by a company whose business is to sell, but they are essential to its continued life (vide infra, pp. 5-17).

quires it.

contract which still remained executory, saying: "In regard to corporations, the rule has been well laid down . . that the *executed dealings of corporations must be allowed to stand for and against both parties* when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the *unexecuted* part of this agreement. *So far as it has been executed*, namely, the four or five years of action under it, . . . each party *has received what he was entitled to* by its terms. There *remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed.* . . . It is not a case of a contract fully executed."

The court, in Planters' Bank *v.* Union Bank, leave it an open question whether the plaintiff shall sue on the express promise to pay contained in the original executed special contract, or on the implied promise to pay arising from the debt created by the rendering of the services at the defendant's request. The plaintiff in this case is quite content with either view, for either view is conclusive of his right to recover the full amount claimed by him. But as one view treats the contract as illegal only, and not void, and the other regards it as entirely void, the two alternatives are better considered separately.

1.

Supposing the written contract to be ultra vires, i. e. illegal, but not void.

In *Bissell* v. *The Michigan Southern & Northern Indiana Railroad Companies*, (22 N. Y., 258, 273, 1860,)

Chief Judge Comstock says: "Let us . . *concede that the unauthorized contracts of a corporation are illegal.* . . *It by no means follows that they are never to be enforced.* An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it."

Several such contracts have been sustained in this court. The question often arises, primarily, concerning the validity of titles taken under these contracts; but, of course, to affirm a title is to confirm the contract which created it.

In 1870, in

Smith v. *Sheeley*, (12 Wallace, 358,)

a corporation, under a contract which was beyond the scope of its chartered powers, took a title to certain lands and paid for them. The court held that the contract having been performed, and the money paid, the original transaction should stand.

In 1878, in

National Bank v. *Matthews*, (98 U. S., 621, 626,)

a national bank purchased a mortgage and note under an agreement which was beyond the scope of its chartered powers, and illegal. The contract being thus executed, the court upholds and confirms the title of the bank to the mortgage, and its rights thereunder; Mr. Justice Swayne saying: "The bank parted with its money in good faith. . . . Under these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor."

In 1879, in

Christian Union v. *Yount*, (101 U. S., 352, 361,)

where a corporation had bought lands under a transaction which, as was alleged, its charter did not authorize, the lands having been paid for, the court refused to consider the objection to the validity of the transaction by which it acquired them.

In *Samuel* v. *Holladay*, (Woolworth's Rep., U. S. C. C., Dist. Kan., 400, 409, 1869,)

a contract was made by the directors of the company in excess of their corporate powers. Mr. Justice Miller says: "The rule is very well settled, and is supported by abundant reasons, that where, at a meeting of a board of directors of a corporation formed for purposes of pecuniary profit, an act is ordered to be done without objection either then or subequently made to the regularity of the meeting by

any director or stockholder, and *the act thus authorized is afterwards performed, its legality cannot afterwards be questioned* in a suit in equity on the ground of irregularity."

One case, from a court other than those mentioned, is also worth citing, because it brings out so clearly the distinction between a mere liability to the State for illegality, and the use of this liability as a defence against payment for work performed.

In

The Oil Creek & Allegheny River Railroad Company v. *The Pennsylvania Transportation Company*, (83 Pa. St., 160, 166, 1876,)

the railroad company agreed to pay the transportation company, (the plaintiff below,) a rebate on the freight upon all oil shipped by the latter company over the line. The oil was shipped and the freight paid, but the railroad company refused to pay the rebate, alleging that the contract was ultra vires. Mr. Justice Paxson, in delivering the opinion of the court, says: "It does not appear to have occurred to the defendants below that the contract . . was ultra vires until it became apparent that . . they had made a bad bargain. They then attempted to repudiate. . . We *do not think the defendants are in a position to defend upon the ground of the illegality of the contract.* . . The defendants had enjoyed the advantages, such as they were. . . The contract was executed, and to say now that it is ultra vires comes with an exceedingly bad grace from the defendants. . . There is *no rule of law which permits them to retain both the benefits and the price. So far as the contract of these parties may be said to be against public policy and transgressive of their respective charters there is ample remedy. There is a mode by which the Commonwealth may call a corporation to account* where it violates its charter or the rights of the people."

This decision is especially important because many of the directors of the plaintiff were also directors of the defendant.

See also

Kelley v. *Newburyport and Amesbury Horse Railroad Co.*, 141 Mass., 496, 1886.

2.

Supposing the written contract to have been not only illegal but void.

a.

Considering this Contract of 17th December 1879 Alone.

If the contract of 17th December be actually void, *and this contract alone be considered*, the plaintiff cannot recover on the express promise contained in it, but must recover on the implied promise which the court pre-supposes as the foundation of every valid common count in assumpsit.

It is scarcely necessary to show that such a common count will lie against a corporation as well as against an individual. This point was settled in this court as long ago as 1813. In

The Bank of Columbia v. *Patterson's Administrator*, (7 Cranch, 299, 303,)

Patterson had made a written contract with the defendant corporation to perform certain services, and had fully performed them before he died. His administrator sued the corporation, declaring upon *common counts only*. Mr. Justice Story holds this a proper form in which to recover against a corporation, saying: "We take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special agreement."

A few years later, in 1827, the court regard the law as beyond dispute, saying, in

The Bank of the United States v. *Dandridge*, (12 Wheaton, 64, 68,)

"It is now firmly established, both in England and America, that a corporation may be bound by a promise, express or *implied*."

This same principle applies to services rendered and money received under an executed contract even if it is illegal or void, as appears from several of the cases already cited.

In *Planters' Bank* v. *Union Bank*, (16 Wallace, 483, 500, 1872,)

the court say that when the illegal contract has been executed "the money or thing which was the price of it may be a legal consideration between the parties for a promise, express *or implied*."

The leading case of

The Whitney Arms Company v. *Barlow*, (63 N. Y., 62, 1875,)

shows that this "thing" which serves as the foundation of an implied promise may be either goods delivered or *services rendered*.

In *Argenti* v. *City of San Francisco*, (16 Cal., 255, 264, 1860,)

the plaintiff was allowed to recover on an "*implied contract for work and labor*," a form apparently equivalent to a common count, in a case where the special contract under which the services were rendered was certainly illegal and apparently void.

Other cases might be cited, but it is not necessary to spend farther time in considering the effect of the contract of 17th December *standing alone*, if it is to be regarded as void, because, in fact, the contract does not stand alone. That contract may disappear totally and yet leave the plaintiff a perfect right of recovery upon an *actual express contract in fact*.

b.

Considering not only the Supposed Void Contract of 17th December but also the Previous Request.

To say that the memorandum of 17th December contained a void contract is, of course, the same thing as saying that it contained no contract at all. In other words, this hypothesis supposes that the plaintiff and defendant met on that day and attempted to make a contract, but failed; the document which they wrote was merely waste paper. If this be true, the case must then be treated in the same way as if the parties had not met at all on that day, or, having met, had said and written nothing whatever, and had shown their meaning only by the acts which followed. Upon such an hypothesis, what are the facts of the case and the rights of the parties?

The facts are:

First. The defendant, for more than a year, requested the plain-

tiff to perform certain services, viz: to bring in business to the company and to take care of the Boston office.

Second. The plaintiff is admitted to have performed some of these acts, and introduces evidence to show that he has performed others.

The mere statement of these facts makes as good a definition of the right of a plaintiff to go to a jury upon common counts for services rendered as it is possible to construct. The difficulty is to understand on what ground the objection to his right to do so is based.

Is it objected that a year's requests are merged in the attempted contract of 17th December? The answer is obvious that a contract which did not exist could not have merged anything.

Is it claimed that the *attempt* to make the contract of 17th December destroyed the previous request? On the contrary the attempt to make a contract for the same services that these offers had treated of is in itself the best evidence of a request for the services.

Is it claimed that the services rendered were themselves illegal? It has already been shown that bringing in business and caring for the defendant's office is not only not illegal but absolutely essential to carrying on the business of the corporation.

Is it said that a director could not perform such services? The answer is that it has already been pointed out in the statement of facts, (supra, p. vi,) that the plaintiff was in fact *not* a director at the time he brought in this business to the defendant, nor during a great part of the time when he took care of its office.

Is it said that, though not really a director, it was agreed that he should become one, and that this prevented him from rendering the services? This very agreement is part of a contract which is, ex-hypothesi, void and non-existent, and which therefore cannot affect these actual services performed.

Is it said that a director can recover no compensation for services rendered? The answer is again that the plaintiff was not a director when a large part of these services were rendered and has therefore an unquestioned right to recover for that portion at least.

Is it objected that the plaintiff was supposed to be a director and that therefore the same rule must apply as if he had been? The

answer is that it is unquestioned that a director may recover for *special services* rendered *outside his directorship*.

Holder v. *Lafayette, Bloomington & Mississippi Railway Company*, 71 Illinois, 106.

Cheeney v. *same*, 68 Illinois, 570.

The Santa Clara Mining Association of Baltimore v. *Meredith*, 49 Maryland, 389.

Citizens' National Bank v. *Elliott*, 55 Iowa, 104.

And that whether or not these were understood by the parties to be special services, is a question of fact to be decided by a jury, and not by the court.

If it be still urged that, even if he has a right to recover, he cannot recover the full one-third commissions, the obvious answer is that the plaintiff has a right to claim that he has in fact accepted the offer for one-third commissions, has thereby made a contract in fact, has performed that contract, and, having thereby created a debt, may declare for that amount on a common count.

If the plaintiff *chooses* to go to the jury on a quantum meruit, giving in such evidence of value as he thinks best and taking what they give him, it certainly does not lie in the defendant's mouth to object.

If it be said, as it is said by the learned Judge, (R. p. 57, ll. 3–4,) that some one else "perfected" the business, the answer is in the nature of a demurrer. No one ever claimed that business brought in by the plaintiff might not be concluded by some one else. (Cf. supra, pp. 45-46.) Under this view of the case the question is not who perfected the business, but who brought it in, i. e. originated it.

If it be claimed that the services were only those required of him as director, and that he is entitled to no pay, the claim is to be met by two simple denials. In the first place, as already said, he was not a director when he performed them; secondly, if he had been, the services were clearly "extra" services in the sense in which this term is used in the cases already cited, (supra, pp. 28-29,) and therefore entitled to compensation in any case, and more especially in a case where it was expressly understood that the services were not to be gratuitous. Indeed, the fact that all parties assumed throughout

that these services were to be paid for is in itself the best evidence that the services were "extra" services. For the ordinary services of a director are rendered gratuitously. In any event this is a question of fact for the jury.

The only other objection to the plaintiff's right to recover, which can be conceived, is that made by the learned Judge in the statement that there is "no evidence," (R. p.58, l. 5,) for the jury upon these counts. The objection is at once so extraordinary, and so important if well taken, that it deserves treatment under a separate head.

III

THE EVIDENCE FOR THE JURY.

The learned Judge finally decided to take the case away from the jury on the ground that there was no evidence to go to them on which they could legally find for the plaintiff. What is meant by the words "no evidence" in such a case it is difficult to understand.

a.

Certainly Sufficient Evidence to go to a Jury.

In the first place, there can be no doubt whatever that the transaction of selling the Kansas City, Burlington and Santa Fé Railway was "business" of the kind contemplated by the contract of 17th December, and also by the propositions of Mr. Short, in which he requested the plaintiff to "bring in business" to the company.

Mr. Short himself defines this business on which the plaintiff is to receive commissions, as: "*All transactions leaving profits to the company by doing the same.*" (R. p. 54, ll. 46–47.)

Since the defendant corporation sold, not its own goods, but the goods of others, (R. p. 22, ll. 27–30,) of course the business of the company, in its broadest sense, included two steps:

First, The business of securing the right to sell;

Second, The business of selling.

Clearly the "business" on which the plaintiff was to divide commissions could not have been the business of acquiring rights of sale alone, because the business of acquiring these rights would never yield any profits to be divided unless followed by the business of selling.

It might be claimed that the business referred to included both the steps of acquiring the right to sell and the sale of the property, were it not that the actions of the parties to the contract show conclusively that the business referred to was the business of selling alone. To make this clear it is only necessary to examine the evidence on pages fifty-four and fifty-five of the bill of exceptions, (R. pp. 54, 55,) where it appears that on 1st May, 1880, and at various other times, the plaintiff had sold or exchanged bonds over which the original right of sale or control had been secured by the defendant company under contracts made in the West, or elsewhere outside the plaintiff's Division, *with the making of which the plaintiff had nothing to do; yet upon all these transactions he was credited with his one-third commissions*; showing conclusively that the business which was to entitle the plaintiff to commissions was the business of selling and *not* the business of acquiring the right to sell; and that the "origin" of the business was the initiation of negotiations with a purchaser, not the making of a contract giving the right to seek purchasers. In the same way the letter of Mr. Short of 10th May, 1880, (R. p. 55, ll. 3-9,) already referred to, (supra, p. 38,) in which he speaks of the proposed sale of the Manhattan Beach and Brighton Beach bonds, shows that the plaintiff was to earn large commissions upon the sale of bonds to purchasers introduced by him, although he had nothing whatever to do with the original acquisition of the right to sell these bonds.

There can, of course, be no doubt that this business of selling bonds and railroads was one which the defendant corporation had the right to transact. The sale of this particular railroad, so far as made by selling its bonds and stock to the Atchison Company, (R. p. 9, ll. 16-20,) was a transaction authorized by the defendant's charter, which empowers the company to "sell negotiable securities." (R. p. 59, ll. 28-29.) The sale of the railroad itself under foreclosure of mortgages—an act which was done only to confirm the title—was authorized by the provision of the charter empowering the defendant to "sell real estate." (R. p. 59, l. 30.) The whole transaction, regarded as the execution of a mandate of commission, is covered by the authority given by the charter to the company to "execute all such trusts as shall be committed to it." (R. p. 59, ll. 32-33.)

In the second place, there was not merely *some* evidence to go to the jury. There was an accumulation of the strongest evidence, tending to show both that the plaintiff "originated" and "brought in" the business, and that it was "transacted" in his Division or Office. Either alternative is sufficient to support the plaintiff's claim, but, as a matter of fact, both conditions were fulfilled.

There is no doubt whatever that the plaintiff originated and brought in the business. On the 23rd of May, the plaintiff, on behalf of the defendant, began, with one of the officers of the Atchison Company, the negotiations which finally ended in the sale of the road. *This was the first meeting of the defendant and the Atchison Road.* The act done on that day may be in itself trifling, but it is vital as marking the "origin of the business." Prior to that time the Atchison Company knew, doubtless, of the existence of the road ultimately bought, and of its possible rivalry, *but prior to that time the Atchison Company did not know the Investment Company.*

The statement of Mr. Short, (R. p. 46, l. 35,) that "Mr. Watson reports" that "Mr. Strong instigated the negotiations in the first instance," is, in the first place, of course, not competent evidence, and, in the second place, is probably not true. For Mr. Thorndike stated that nothing had been done about this road; (R. p. 37, ll. 21-22;) that in his recent visit to the West, (where Mr. Strong was,) "no special mention was made of it;" (R. p. 37, l. 22;)

and that he "had not seen" the circular. Mr. Coolidge's statement is to the same effect. (R. p. 44, ll. 26-27.) In any event, competent evidence in the line of this statement by Mr. Short, if it existed, would only create conflict of testimony between Mr. Short and Mr. Strong on one side, and the plaintiff, Mr. Thorndike and Mr. Coolidge, on the other—a fact which in itself shows conclusively that the testimony must be submitted to a jury. The attempt by Worden to negotiate in New York did not begin, on Mr. Short's own statement, until Wednesday, 26th May, (R. p. 39, l. 33,) three days after the instigation of the negotiations by the plaintiff. Mr. Short himself admits that the transactions originated in the plaintiff's Division, for, in his letter of Friday, the 28th, he states that the negotiations had been "*transferred* to New York," (R. p. 40, ll. 14-15,)—a statement which in itself implies that the negotiations had originated, and had been previously carried on, in Boston. The learned Judge, indeed, says that "it appears that the business which culminated in the sale of the railroad to the Atchison Company was a business which had originally come to the New York office;" but this is a statement which is erroneous on the face of it. If the Court meant to say that the origin of the business was the contract for placing the bonds, made between the Investment Company and the Kansas City, Burlington & Santa Fé Railway Company through Mr. Schofield, its President, and not the transactions which led immediately to the sale of that road to the Atchison line, then the learned Judge is contradicted by both the plaintiff and the defendant. For the evidence on pages fifty-four and fifty-five of the bill of exceptions, just considered, shows conclusively that the "origin" of the business was the opening of the negotiations with the purchaser, not the acquisition of the right of sale. If the learned Judge refers to the Worden incident, he entirely failed to regard the dates given by the defendant's officers themselves, which show that Worden began to negotiate at least three days later than the plaintiff. In either alternative the evidence directly contradicts the statement of the Court, there is no evidence which supports it, and this portion of the ruling of the learned Judge, (R. p. 56, ll. 33-43,) is evidently founded on an inadvertence.

This business having "originated in the Eastern Division," the plaintiff is entitled to recover, under his fifth count, founded on the

written contract of 17th December, 1879. The business having also been "brought in" by the plaintiff, he is entitled to recover under one of his common counts, founded on the execution of the contract in fact, made by the plaintiff's acceptance of Mr. Short's repeated offers. (Vide infra, pp. 87-88.) Under a still broader view, the plaintiff's services having been performed at the defendant's request, he can recover on a common count for services rendered, on a quantum meruit. (Vide infra, p. 88.) It is not necessary to inquire, under the written contract, where or by whom the business was "transacted," for the contract is in the alternative, giving the plaintiff commissions on "all business originating in said Eastern Division *or* transacted at said Boston Office." (R. p. 11, ll. 5-7.) But as a matter of fact the business which ended in the sale of the railroad, and earned for the defendant over $79,000 profits, began, was wholly transacted, and ended in the Eastern Division or Boston Office. It began on the 23rd of May with the interview of the plaintiff with the officer of the Atchison Road, and ended on the 10th of June, with the signature of the contract for sale, made on that day, between the Atchison Road and the defendant. This paper is a complete memorandum of sale, stating that the Atchison Company "will pay," (R. p. 9, l. 4,) and that the defendant "will sell," (R. p. 10, l. 5,) the railroad, with its appurtenances, described in detail, at a given price. It also contains stipulations for perfecting the title by foreclosure, (R. p. 9, ll. 31-33,) and provides for the payment of the purchase money at a specified time and place. At the moment that the signatures had been affixed, the "business of selling" the road was complete, the defendant was bound to sell the road, the Atchison Company was bound to pay the money, and the profits were secured.

This contract of sale of 10th June, 1880, was made in Boston, and the business of which it was the closing act was, therefore, wholly "transacted in the Eastern Division," i. e. "transacted at the Boston Office." It was, of course, not made within the four walls of the room where the plaintiff had his desk and the sign of the company, but this is immaterial, because, by the very terms of the contract of 17th December, the "*Boston Office*" is itself "*designated as the Eastern Division.*" (R. p. 10, l. 44.) In other words, the parties have themselves, as previously pointed out, (supra pp. 45-46,)

defined the *words "Eastern Division" as synonymous with the words "Boston Office,"* and have themselves used the words "transacted at the Boston Office" as the equivalent of "transacted in the Eastern Division." It would, indeed, have been sufficiently clear, on the face of it, that the parties never meant to restrict the plaintiff's commissions to business done within the four walls of any particular room; but lest the double phrase, (used probably only for euphony,) be misunderstood, the parties have taken the precaution to themselves define the two phrases as meaning the same thing.

The acts subsequent to the making of this contract of sale were all merely the *performance of that contract*—a performance which, as to the payment, necessarily took place in New York, because the contract itself so provided; and which, as to the foreclosure, necessarily took place in the West, where the land was situated. The subsequent paper of the thirtieth* of June, (which the pleadings attempt to set up as a new contract,) was merely *made in execution of the provision concerning foreclosure and perfecting of title contained in the original contract of sale.* It recites the delivery of the bonds, (R. p. 16, l. 8, p. 17, ll. 14-16,) it was made after the payment of nearly the whole of the purchase money under the original contract of sale and provides for the payment of a small residue only, and, so far from being a substitute for the contract of 10th June, was evidently made *after* that contract had been substantially performed, and merely in pursuance of one of its terms. In any event, the profits were not made under this paper of the thirtieth of June, it never was completed, not having been signed by all the parties, (R. p. 15, ll. 15-16, p. 16, l. 29,) and it may be left entirely out of consideration.

It is neither possible nor proper to attempt a recital of the evidence of the plaintiff's services. The most condensed statement that can be made of it occupies eight printed pages, (supra, pp. vii-xiv.) It is sufficient to say here, that there is a cumulation of testimony showing that the plaintiff is entitled to recover on one or another of the counts of his declaration, and the plaintiff has a right to have this mass of evidence submitted to the jury. When the evidence is conflicting, this conflict but emphasizes his right.

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*Misprinted "thirteenth" in the record. (R. p. 15, l. 11.) See R. p. 50, ll. 39-41.

b.

Services in Effect Those of a Broker.

The learned Judge says that the plaintiff "was not a broker;" (R., p. 58, ll. 9–14;)—a fact literally true, but which ignores the precise analogy which best applies to this view of the case. Indeed, in one sense of the case he *was* a broker, and working on a broker's basis; for he was employed to sell, upon commission, the goods of his principal—a statement which is not only literally true in this case, but affords a very good definition of a broker in general. The Court, by implication, admits that there is enough evidence to support a claim for commissions for services as a broker, and that is precisely what the plaintiff's services were, so far as they consisted in selling the bonds, securities and railroads which formed the wares which his principal had for sale.

The provision that, after the plaintiff had once brought in a customer, he was entitled to commissions, not only on the sale made at the time of introducing him, but on all "subsequent dealings," (R., p. 24, l. 50,) shows conclusively that the defendant's president regarded the act of bringing in or introducing a customer who bought, as the vital act which entitled the plaintiff to a commission.

It seems almost unnecessary to say that it cannot be supposed that he has already been paid for his services. The $1800 is, of course, not payment; for that was received under the contract and therefore on the understanding that it was part payment toward his one-third commissions. But inasmuch as, to use the court's own words, "there *was* no express contract," (R., p. 58, ll. 14–15,) he is deprived of his agreed pay, and of course it is for the jury to say what the services were worth. Non constat that they will not regard the provision he has lost as the more valuable element in his pay—as in fact it was. Indeed the position of the Court is, apparently, not that there is no evidence of services rendered, but rather that the services were of a kind for which the plaintiff can claim no compensation, or were rendered under "circumstances," (R. p. 58, l. 15,) which require him to regard them as lost.

c.

"Done Under the Contract."

But the final position of the Court is taken upon a ground which is most incomprehensible of all. He says: "Mr. Hubbard very fairly states that what he did was done under the contract." (R., p. 58, ll. 6–7.)

It is difficult to consider this objection seriously. The immediate answer that suggests itself is: Of course it was. After a year and a quarter of negotiations both sides *thought* they had made a contract providing for the services an exact measure of compensation—the only point on which an express contract was required at all, for the law would imply the rest. They not only thought so at the time when they made the contract, but they thought so during the whole period in which they were respectively rendering and receiving these services. And this is literally all that the phrase used by the plaintiff, and quoted by the Judge as an admission, means or can mean.

The learned Judge apparently thinks that the plaintiff ought to have taken the precaution to say to the defendant: "I *suppose* that, in doing what you request me to do, I am acting under the contract which we are supposed to have made; but if it turns out that we are all incapable of acting like ordinary human beings in making that memorandum, let it be understood that I am *not* giving you these services, but am rendering them because you request them, and because you expect to pay, and I expect to be paid for them." One would have supposed, were it not for the statement of the learned Judge, that such a statement would have been, in the first place, quite uncalled for, to say the least, between sane business men, and in the second place, if it were needed, that it had been said as plainly as words, acts and a year's discussion about price could say it. The services were asked for and they were rendered. Of course both parties *supposed* they were rendered "under the contract," *i. e.* at the contract price, but they were rendered in consequence of a *request* which long antedated the contract, and which was so far from being revoked by the attempted contract, that the con-

tract, or the attempt to make it, is in itself the best possible evidence of the continuance of the request. But whether supposed at the time to be at one price, viz., the contract price, or at another price, viz., the amount offered by Mr. Short continuously, or at still another price, viz., what they were worth, it was understood by both parties that the services were asked, were rendered, and were to be paid for;—and these three elements make precisely the essential elements needed to support a common count in indebitatus assumpsit for services rendered.

I. Chitty on Pleading, p. * 339, (3d Am. from 2d Eng. Ed).
II. Chitty on Pleading, p. * 35. (Same Ed.)

The learned Judge finally disposes of the case by saying: (R., p. 58, ll. 14–18:) "There was no express contract, and there are no circumstances from which it can be concluded that any kind of an implied contract existed between the investment company and the plaintiff by which he was to have a commission on this transaction." So far from finally disposing of the case, this sentence shows both an inadvertence on the part of the Court concerning what the plaintiff is entitled to prove under the common counts used in his declaration, and a misapprehension of the meaning of the words "implied contract."

d.

What is Contained in the Plaintiff's "Count on an Account Annexed."

The form used in the plaintiff's declaration is what is known, in Massachusetts practice, as "a count on an account annexed." Its use is prescribed by the State Statute as follows: "A count on an account annexed, . . . may be used in an action of contract, when one or more items are claimed either of which would be correctly described by any one of the common counts according to the natural import of its terms."

Public Stat. Mass., Chapter 167, Sect. 2, Seventh.

The items claimed here are, as appears from reference to the account annexed, (R., p. 8,) services rendered concerning the sale of this railroad to the Atchison Road. Under the statute, this form is to be regarded as equivalent to "any one of the common counts" which, under the old Common Law practice, would have been used to describe the cause of action.

One form would evidently have been:

Indebitatus assumpsit for work and labor rendered by the plaintiff to the defendant, at the defendant's request, at a fixed price, (viz.: the one-third profits offered by Mr. Short during the whole year.)

Or, since under any common count the plaintiff may recover any amount less than the sum claimed,

(See 1 Chitty on Pleading, p.* 107, 3d Am. from 2nd Eng. Ed.,)

this may also be regarded as equivalent to the old count in quantum meruit, viz:

Indebitatus assumpsit for work and labor rendered by the plaintiff to the defendant, at the defendant's request, of some value not fixed but to be determined by the jury.

The plaintiff's declaration is therefore to be regarded as containing at least two counts in indebitatus assumpsit.

First, A count for work and labor at an agreed price.

Second, A count for work and labor on a quantum meruit.

e.

What the Plaintiff can Prove Under Each of These Common Counts.

To establish his claim under the common count in indebitatus assumpsit for services rendered at an agreed price, the plaintiff is required to show:

First, The creation of the agreement for services and price, through the plaintiff's acceptance of the defendant's continuous offer to pay one-third commissions for services in bringing in business; thus creating a *contract implied in fact*, *i. e.* a contract to be implied by the jury from the evidence which here is set out in the bill of exceptions;

Secondly, A performance of this implied contract in fact, thus creating a *debt*.

This is all that the plaintiff is required to prove; for these two facts being established, there follows, by a fiction of the court,

Thirdly, A promise implied by law,—being the promise referred to by the word assumpsit,—upon which implied or fictitious promise the plaintiff is supposed to recover.

To establish a claim under a common count in indebitatus assumpsit for services rendered on a quantum meruit, the plaintiff does not need to show any contract in fact whatever, but simply:

First, That the services were rendered under such circumstances as to create a *debt*, viz., at the *request* of the defendant; whereupon there follows, as before,

Secondly, A *promise implied by law* upon which he recovers.

The learned Judge has evidently entirely confused the *implied promise in fact*, which is required only under the first count, with the *promise implied by law*, which is common to both these counts, and to every other count in indebitatus assumpsit. The words "implied promise" are evidently used by him with reference to a promise implied *in fact*.

Such a promise is indeed needed in the first count. As to this count, enough has already been said elsewhere to show that the Court was in error in holding the evidence insufficient to entitle the jury to find the existence of this contract—a contract in fact, but a contract quite distinct from the contracts in fact contained in the written memorandum. If more than a year's continuance of an offer, emphasized by an attempt to embody this offer in a written contract, would not be sufficient to entitle a jury to infer, from the plaintiff's acts in attempting to make this contract and in working to bring in business, an acceptance of that offer, then it is difficult to conceive what evidence would be sufficient.

But it is when considering the count on a quantum meruit, that the error of the learned Judge is manifest. He seems to consider some implied contract, *i. e.* a promise implied in fact, to be essential to the maintenance of that count, whereas nothing of the kind is needed. The only "implied promise" that is needed under this count is the promise implied by law; which is, as has been

already said, merely a fiction of the court. It needs only a brief review of the history of the action to establish this. It is, of course, familiar knowledge that the assumpsit in indebitatus assumpsit was a promise implied in order that a plaintiff might sue in assumpsit, instead of being compelled to sue in an action of *debt* and thereby incur the risks of the "wager of law" and the other perils which might meet him in that form of action.

See 1 Chitty on Pleading, p. * 107, (3d Am. from 2nd Eng. Ed.)

3 Reeves Hist. Eng. Law, p. 410 Note (*a*), Finlaison's Ed.

It is sometimes supposed that the *jury* implied the promise described by the word assumpsit; but a promise implied by a jury would be a promise in fact proved by circumstantial evidence—such a promise, for instance, as the jury would be entitled to infer, from the evidence, in this case, as the first requisite of the first common count—but a promise totally different from the so-called promise in indebitatus assumpsit. That this latter is in reality only implied by the court, and that it was originally regarded as a mere fiction, is proved by the fact that, in the earlier cases, it is considered necessary to traverse only the indebitatus.

33 Henry VIII, New Cases, 5.

"This latter form of a traverse," as Mr. Reeves says, "confirms the idea that they considered the *owing* and the *promising* to pay as the same thing; and that where the *owing* was disproved, the *promise* was likewise."

3 Reeves Hist. Eng. Law, 407, Finlaison's Ed.

In other words, it is only necessary to prove the *debt*; and no promise in fact, express or implied, is needed to do this in the case of services rendered. For it is only necessary to show that the services were rendered at the *request* of the defendant, to establish a quantum meruit for work and labor.

See 1 Chitty on Pleading, p. * 102, (3d Am. from 2nd Eng. Ed.)

Comyn's Digest, Debt, B.

See also *Day* v. *Caton*, 119 Mass., 513, 1876.

Of course an executed express promise in fact may be the foundation of the debt, and therefore of the indebitatus assumpsit, in this sense, viz: that, from the circumstantial evidence contained in the *fact* of the parties making an express promise or contract on the subject, the jury may infer the requisite request. But of course this express promise, if it existed, would have entitled the plaintiff to go into assumpsit, in any case, declaring on its breach in a special count; and it is therefore evident, from the reason universally given for the invention of common counts—viz: to enable a plaintiff to sue in assumpsit who would have otherwise been obliged to sue in debt—that they must have been first invented for cases *where the plaintiff had no promise in fact on which he could rely.* For, *had there been a promise on which he could sue, it would have been unnecessary to invent one.* So that even if the learned judge had been correct in holding that there was no express contract in fact and no implied contract in fact, so far is this feature from depriving the plaintiff of a right to sue on a quantum meruit, that it is *precisely this feature which puts his right to sue on a quantum meruit beyond question.* For it is precisely to the case of a plaintiff having no promise in fact to admit him into assumpsit that the common count peculiarly applies; more than this, it is the case for which it was especially invented. In a word, the plaintiff has the *ideal case for a common count on a quantum meruit.*

And not only is it clear on principle that the plaintiff can sue on a quantum meruit, but it is established by the authorities as well.

"Where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, *if the case be such that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labor done.*"

1 Chitty on Pleading, p. * 334, Note [136], (3d Am., from 2d Eng. Ed.) and cases cited.

This case is most emphatically "a case such that, supposing there had been no special contract, he might still have recovered for work and labor done." For there are repeated requests entirely independent of any written contract, and there are repeated acts of services.

Even if there were "no express contract" because of supposed constructive fraud, still this would give the defendant no right to the plaintiff's services without paying what a jury finds them to be worth. As Mr. Justice Miller says of the plaintiff in

Wardell v. *Union Pacific Railroad Co.*, (4 Dillon, 330, 339, U. S. C. C., Dist. Nebraska, 1877,)

"Apart from the contract, and if it had never existed, he is entitled to a *fair and reasonable compensation for his labor and time and skill. The fraud gives . . the company no right to these without just compensation.*

Indeed it is impossible to understand how the learned Judge could have taken such a case away from the jury. For, not only are the essential elements of a debt for work and labor here present, but they are multiplied over and over again. The request is admitted by the bill of exceptions, is given verbatim in the letters of Mr. Short, and is proved by the fact of the parties making or attempting to make the contract of 17th December. Even if the parties had never met on that day, the request is complete and ample; if the proceedings of that day are considered, they only serve to confirm the request. That certain services were rendered, is admitted on all sides, and is abundantly shown in the testimony set out by the bill of exceptions. Whether these services were in fact services which brought in business to the defendant, was a complicated question of fact, depending on conflicting evidence, which it was for the jury, and the jury alone, to determine.

Respectfully submitted by

ROBERT DICKSON SMITH,

WILLIAM WARREN VAUGHAN,

of Counsel for the Plaintiff.

114-696

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1886.

No. 103.

LUCIUS L. HUBBARD, PLAINTIFF IN ERROR,

vs.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

ADDITIONAL POINTS OF THE PLAINTIFF IN ERROR, IN REPLY.

I.

As to the Statement of Facts contained in the defendant's brief.

1. In the brief of the learned counsel for the defendant in error, he says, on page 7,

"On the 27th day of December, 1879, the plaintiff was elected a director of the defendant company and also appointed its assistant vice-president. All these acts were performed by the respective parties, pursuant to the terms of the said contract."

This is an error. The board of directors *attempted* to elect the plaintiff a director, but, as pointed out on p. vi. of the brief of the plaintiff in error, they failed to elect him for want of power to do so. The number of the board had been [illegible]

is nothing to identify the "Mr. Strong" of this letter of 6th June,

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This is an error. The board of directors *attempted* to elect the plaintiff a director, but, as pointed out on p. vi. of the brief of the plaintiff in error, they failed to elect him for want of power to do so. The number of the board had then been fixed at five; (R. p. 34, l. 46;) these five directors were all in office at the time of this meeting of 27th December, 1879; (R. p. 35, l. 1;) and there was consequently no vacancy in the board; (R. p. 34, ll. 40-41;) and as the only power in the directors to elect a director was that given by the charter, (R. p. 60, ll. 12-13,) to *fill vacancies*, they were evidently powerless to create a new directorship, that power being expressly reserved to the stockholders, (R. p. 34, ll. 13-23,) by Section 5 of Chap. 32 of the Stats. of Mass. 1860, which provides that the number of directors shall not be increased or diminished, or their term of office changed, without the consent of the owners of a majority of the shares."

The plaintiff never, in fact, became a director till 5th June 1880, some two weeks after he had "originated the business" here in suit. See brief of plaintiff in error, p. vi. and p. 77.

2. On page 7 of the defendant's brief it is said:

"During this year the plaintiff rendered monthly accounts to the New York office, as required by the contract. In none of these accounts did he claim that the sale of the Kansas City, Brulington and Santa Fe Railroad property was transacted at the Boston office or originated there; or that he was entitled to any portion of the profits of that transaction."

This is quite true, as far as it goes. But the additional fact should be added, that these accounts covered *only cash or bonds received and actual payments made at the Boston Office*, (R. p. 36, ll. 11-20,) and that as the cash for the transaction now in suit never came through the plaintiff's hands, to have introduced anything concerning this transaction into these accounts would not only have been irrelevent, but would have *actually falsified the accounts*.

3. On pages 8 and 9 of the defendant's brief, it is said:

"It further appears that previous to the 23d day of May, 1880, Mr. Watson, the secretary of the defendant company, had had an interview in Kansas with a Mr. Strong, who was then the general manager of the Atchison, Topeka and Santa Fe Railroad, and had offered the bonds and stocks of the Kansas City, Burlington and Santa Fe Railroad to Mr. Strong on behalf of his company, and that Mr. Strong had called the attention of his company to the matter. (Page 46, folio 196 of Record.) At this time Mr. Strong was one of the defendant's stockholders."

The plaintiff regrets to be obliged to characterize this statement as totally unwarranted; in fact, it contains no less than seven unwarranted statements.

The only authority for this paragraph which is or can be referred to is the letter of 6th June, 1880, from Mr. Short to the plaintiff, printed on page 46, lines 30-44, of the record. Now it appears, on an examination of this letter and the rest of the record, that:

First. There is no evidence in the record that "at this time Mr. Strong was one of the defendant's stockholders," for there is nothing to identify the "Mr. Strong" of this letter of 6th June,

1880, with the "W. B. Strong" who was said, on the 17th of December, 1879, to own five shares of stock. (R. p. 32, l. 12.)

Second. There is absolutely nothing in the record to even suggest that this Mr. Strong was an officer of the Atchison, Topeka and Santa Fe Railroad Company or to connect him in any way with that company.

These errors are trifling compared with what follows.

Third. The whole letter proves nothing whatever. Least of all does it prove the truth of the statements made in it by the defendant's own officers in the defendant's own favor. A demurrer to the evidence admits the truth of the opponent's evidence, but of course it does not establish the truth of the self-subserving statements of the party demurring.

Fourth. This self-subserving statement is not evidence at all. It is merely an allegation in a letter of something claimed by the defendant to have been done in its own favor, not a statement of a fact by a witness on the stand. Such a statement of course is not evidence except when it binds the party making it as an admission against his interest.

Fifth. Even if Mr. Short had made the statement on the stand, or by deposition, the statement would still have been inadmissible, because it was merely hearsay, being a repetition of what Mr. Watson had said to him, (again in the defendant's favor,) in his telegram.

Sixth. Even if Mr. Watson had been on the stand himself, not even his statement would have been competent testimony; for it would evidently have been hearsay again, being a statement of what he had been told by Mr. Strong.

It would require considerable ingenuity to invent an artificial example in twelve lines that should violate so many rules of evidence.

Seventh. Even if the statement were admissible, it is not true. As pointed out in the brief of the plaintiff in error, (pp. 80-81,) the evidence of the plaintiff, of Mr. Coolidge and of Mr. Thorndike all contradict it, and there is not in the whole case a *scintilla* of evidence that any negotiation took place between the defendant and the Atchison Road, or any of its officers, until the plaintiff origi-

nated the business in the Eastern Division on 23d May, 1880, as stated in the record, (p. 37.)

Moreover, the whole letter of 6th June is in itself, (as printed in the brief of the plaintiff in error, p. 37,) a most telling piece of testimony in the plaintiff's favor, as showing that Mr. Short foresaw that this business would come under the plaintiff's contract, and that he was travelling quite out of the record in an attempt to forestall the plaintiff's right to claim compensation on the ground that he had originated the business.

4. On page 12 of the brief of the defendant in error it is said:

"June 13th all of the parties met at the office of the defendant company in the city of New York."

This is an error. The record states that this meeting took place on the thirtieth of June. (R. p. 50, ll. 39–48, p. 51, ll. 1–7.)

On the same page is printed an exhibit apparently beginning: "This agreement, made this 13th day of June," etc.

This is not an exact copy of the record. The date is there printed "thirteenth"; (R. p. 15, l. 11;) but on referring to the record at page 50, lines 39–40, it appears that this exhibit is referred to thus:

"Another paper was made in New York city, June 30, 1880, a copy of which is annexed to the pleadings and made part," etc. The same date is again repeated in figures a few lines below and also in the pleadings of both parties (R. p. 13, ll. 30–32, p. 19, ll. 10, 11) showing that the word "thirteenth," on page 15 of the record, must be a misprint for "thirtieth."

5. On page 15 of the brief of the defendant in error it is said of this paper of thirtieth June:

"This agreement was intended to and did take the place of the agreement of June 10th."

The contention of the defendant is obvious. It is attempted to show that the property was sold under and by this contract made in New York, and that the profits earned under it. This attempt is amply answered in the brief of the plaintiff in error, page 83. It is enough here to say that before establishing this position it must answer to the satisfaction of the Court these fatal questions:

How can a contract that is not signed take the place of a prior contract that is signed? (R. p. 15, l. 15; p. 17, l. 29).

How were bonds sold under an agreement which recites that these bonds had been already delivered and "transferred" to the purchasers? (p. 16, l. 8; p. 17, ll. 14–16). How was money earned under the paper of 30th June, when it appears that most of the goods had been delivered and over nine-tenths ($343,000) of the money had been paid under the prior agreement of 10th June? (R. p. 9, ll. 13–16; p. 16, l. 8; p. 17, ll. 14–16; p. 50, ll. 41–42.)

How did the defendant earn *profits* amounting, as it admits, to over $79,000 under an agreement which provides for a total *payment* of $38,600 and $700 each for ten bonds? (R. p. 16, ll. 43, 44; p. 17, ll. 14–16; p. 9, ll. 25–27.)

6. On page 16 of the defendant's brief it is said:

"The plaintiff admits that he knew that the dividends of July, 1880, and of April, 1881, amounting in the aggregate to sixty per cent. of the capital stock of the defendant were paid out of the gross earnings, which accrued to the defendant by reason of the sale of the property above set forth."

On the contrary, the only fact brought home to the plaintiff was the receipt of a notice stating that the dividend of July, 1880, was paid "out of the general earnings of the company," (R. p. 52, ll. 14-15,) and the fact that there was nothing in the notices of the later dividends to indicate in anyway the source of the profits. (R. p. 28-29.) Of course the plaintiff supposed, as any one who knew the facts must suppose, that these general profits included the profits on the sale of the Burlington Road; but they were all mingled together and what proportion the latter formed of the whole, he neither knew nor had any means of knowing.

This whole testimony is apparently introduced to prove a waiver of his claim by the plaintiff, as shown by his act of receiving these dividends. As the question of waiver is one of intent, and as the plaintiff protested before the dividends were declared, and reiterated his claim both before and after receiving the dividends, and took them only on being advised by counsel that there was in this act no evidence of waiver, there certainly was never more conclusive proof of an intent *not* to waive a claim than is presented by the facts in evidence in this case.

II.

To the Points made in the brief of the defendant,

To the First Point.

On page 22 of the brief of the defendant in error, it said of the plaintiff,

"The services rendered by him were exceedingly slight and were such as any paid clerk or employee of a corporation would render without looking for extra compensation."

This is simply misleading.

The plaintiff is not a paid employee of the company, claiming extra compensation beyond what he is entitled to, but an employee who claims that he has never yet been paid his agreed wages. There is no question of "extra" compensation in the whole case.

See the brief of the plaintiff in error, pp. 30-34.

On the same page of the defendant's brief the statement is made that at the interview of 23d May, 1880, with Mr. Thorndike, when the business originated in the Eastern Division, the plaintiff "learned that the matter of the purchase of the property in question by that road had been already brought to its attention." This is made as a statement of fact, but it is absolutely unfounded. The record states, (R. p. 37, ll. 19-22,) that "Mr. Thorndike said that the company [i. e. the railroad afterward sold] was mentioned by them [i. e. the Atchison officers] at the time of the stockholders' meeting, together with several other companies which bore directly or indirectly on them, but *that* nothing was done about this road, *no specific mention was made of it.*"

What is more natural than that a rival road or its business should be in some way alluded to in an annual meeting of a railroad? But there is not a trace of evidence that the *purchase* of the railroad was suggested, or even thought of, or that the Atchison Company ever knew of the proposed extension of the Burlington road, which ultimately caused its purchase. On the contrary, they evidently did not know of it, for Mr. Thorndike *had never seen the circular*, (R. p. 37, ll. 24-25,) which contained the first statement of the proposed extension (R. p. 61, ll. 17-19.)

To the Second Point.

On page 2, of the brief of the defendant, it is alleged of the plaintiff that

"He *first knew* that the business had been secured by the defendant when he received from the defendant for distribution the copies of the circular offering the property for sale."

There is not a particle of evidence to support this allegation; non constat that the plaintiff had not known of it from the beginning.

On the same page it is said;

"The Kansas City, Burlington and Santa Fe road was entirely located in the State of Kansas, and not in any of the States comprised in the so-called Eastern division."

This is true, but immaterial. Neither the City of Toledo, (R. p. 54, ll. 25-26,) nor the other Western municipalities (R. p. 55, ll. 13-15,) nor the Manhattan & Brighton Beach railways or hotels, (R. p. 55, ll. 3-6,) were situated in the Eastern Division; yet the sale of the bonds and mortgages upon these properties is admitted by the defendant to entitle the plaintiff to commissions, either as "business originating" or "business transacted" in the Eastern Division. (R. p. 54, ll. 19-24, p. 55, ll. 15-16, ll. 7-9.)

It is especially to be noted here that the sale of the railroad now in question was affected by a sale of the bonds, and not by a deed of the property itself, (R. p. 9, ll. 13-20,) although the price paid for the bonds depended in part on the length of the track.

To the Third point.

This point is, as stated in p. 25 of the defendant's brief:

"The words 'transacted at said Boston office,' evidently means business, which, from its inception to its final completion, had been transacted at that office by the plaintiff."

This contains two propositions. The first is that "business transacted" in the Eastern Division means "business wholly transacted" in that Division.

Here the defendant stands in a dilemma. It is admitted that the sales, just referred to, in the Eastern Division, of bonds and

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This contains two propositions. The first is that "business transacted" in the Eastern Division means "business wholly transacted" in that Division.

Here the defendant stands in a dilemma. It is admitted that the sales, just referred to, in the Eastern Division, of bonds and

mortgages of New York and Western railroads and municipalities, secured under New York and Western contracts, were within the terms of the plaintiff's contract, either as "business originating" or as "business transacted" in the Eastern Division.

If they were "business originating" there, then the "origin" of the business was not the securing of the contracts, (as alleged in the Second Point,) which took place in the West, but the opening of the negotiations for the sale, which took place in the Eastern Division.

If they were "business transacted" in the Eastern Division, then the defendant's Third Point vanishes; for business could not be "wholly transacted" in the Eastern Division, the origin of which took place, as the defendant itself alleges, in the West.

See also the brief of the plaintiff in error, pp. 79 and 81-83.

An attempt is made on page 27 to show that the sales above referred to, which were admitted to fall under the contract, were confined to bonds actually handed to the plaintiff to sell. But this attempted explanation fails to account for the proposed sale of Manhattan and Brighton Beach bonds, (R. 59, ll. 3-9,) which, it is admitted, would have fallen within the contract, and a portion of the negotiation of which were to take place in New York, where the plaintiff's "folks" *i. e.* his customers from Boston, were to examine the road, and, perhaps receive the bonds.

As to the other allegation made under this point, viz.: That the business must be wholly transacted "by the plaintiff" it is sufficient to say:

First. That there is no requirement in the contract that the business shall be transacted by the plaintiff or by anybody in particular, but only that it shall be transacted in the Eastern Division. In other words, the crucial question is not *by whom* is it done, but *where* is it done. And it has already been shown that the business began in Cambridge on the 23d of May was transacted in Boston and ended in Boston, on the 10th of June, with the signature of the contract of sale of that date.

The carrying out of this contract was, of course, performed elsewhere, but the "sale" was made and the "business was trans-

acted," in the sense in which the parties had shown by their acts that they used the word, when the document was signed.

See the brief of the plaintiff in error, pages 79, 81-83.

Such is also the universal law of factors and brokers in general.

See the brief of the plaintiff in error, page 84.

On the same page of the defendant's brief it is said:

"The services rendered by the plaintiff were very slight."

In the first place, if this statement were ~~un~~true, the fact would be immaterial. The only facts in issue under the counts on the written memorandum—that is, in the first, fifth and sixth counts,—are:

Where did the business originate?

Where was it transacted?

In the second place, the statement is not true. Any argument on this point is premature, and should have been reserved for the jury, and not addressed to this Court, where it touches no point now in issue. It would be equally improper for the plaintiff to review the evidence for the jury on this point at length;—the most concise statement of it that can be made occupies eight printed pages; (see the brief of the plaintiff in error, statement of facts, pp. VIII–XV;)—but it may perhaps be permissible to speak of a few points.

On the 23d of May, Mr. Thorndike, the Comptroller of the Atchison road, reached home. Immediately on the same day, although it was Sunday, the plaintiff sought him out at his house and brought to his knowledge, for the first time, the fact that the road was to be extended and become a rival to his road, (R. p. 37, ll. 14-15,) informed himself that the Atchison Road had done nothing to get it out of the way, (R. p. 37, ll. 16-17, l. 22,) and gave Mr. Thorndike his first information that the defendant had the bonds of the road for sale. He also gave him the information which led to Mr. Coolidge's subsequent abortive attempt to negotiate in New York. (R, p. 37, ll. 27-28, ll. 9-10, l. 35; pp. 44, ll. 23-25.) These and the other acts done on this day, were the origin of *the business* which ended in the sale to the Atchison road on June 10th,

1880, of both the bonds issued under the circular and the completed road. The act may have been inappropriate to the day, but as it led to a profit of over $79,000 to the defendant, it does not lie in its mouth to raise the objection. At this time, and until the afternoon of the following Friday, (R. p. 39, l. 25; p. 40, ll. 26-28, ll. 38-40,) the plaintiff had no authority to sell the completed railroad itself but only the bonds mentioned in the circular; but on the following day, the 24th of May, he originated a new set of negotiations for the sale of the road itself by proposing to Mr. Thorndike: "If the Investment Company *can sell this road* to your company will you buy it?" (R. p. 37, ll. 41-42.) The proposition made on the previous day had been the origin of the business of selling the bonds mentioned in the circular; the interview of the 24th marks the origin both of the business of selling the road itself and the origin of acquiring the right to sell it. On Tuesday, the 25th, the plaintiff follows up his plan of getting authority to sell, and of selling the whole road to the Atchison company, by writing to the defendants' president: "*If the A. T. & S. Fe will take us can we sel to them?*" (R. p. 38, ll. 2-3.)

On Wednesday, the 26th, by return of post, Mr. Short answered: "*Yes.* . . . Mr. Thorndike couldn't do a better thing for the A. T. & S. F. than to have that company absorb us. *Suppose you see about it at once.*" (R. p. 38, l. 29, ll. 36-37.) Mr. Short had not then the actual authority to empower the plaintiff to sell the road, but obtained a full ~~no~~ ratifying authority on the following Friday, as previously stated. On the following day, Thursday, the 27th, the plaintiff, armed with this authority, went to Mr. Coolidge, the president of the Atchison road, and proposed to and did "*open negotiations with him*," (R. p. 47, ll. 35-36,) in addition to his previous *negotiations with Mr. Thorndike.* The negotiations related both to a sale of the bonds mentioned in the circular and the sale of the road itself. The former, considered alone, Mr. Coolidge did not wish to buy; but he said that he *wanted to buy the road itself*, (R. p. 48, l. 22,) and that "if they would only name a price he would consider it" and desired the plaintiff to bring him a price for the road. The plaintiff reported to Mr. Short that what Mr. Coolidge wanted was not simply the bonds under the circular, but the

road itself and requested a telegraphic answer fixing a price if possible. On Friday, the 28th, after receipt of the plaintiff's letter, Mr. Short secured from Mr. Schofield the right to sell the completed road itself and telegraphed the plaintiff; "Keep C. & T. on the hooks for Schofield's 45 miles as a last resort." On receipt of this and a second telegram, the plaintiff on the same day saw Mr. Coolidge, who definitely declined to buy the bonds under the circular, or the extended road; (R. p. 41, ll. 13-14,) but agreed to buy the completed road if the terms could be made satisfactory. (R, p. 41, ll. 14, 35; p. 49, ll. 34-37.)

The Worden incident, with the abortive attempt of Mr. Coolidge to negotiate in New York, are sufficiently treated in the plaintiff's brief, pages xii and xiii and page 81. It is clear on the whole evidence that at this time the transactions had been substantially completed. The plaintiff had introduced the defendant to the Atchison road and the Atchison road to the defendant—a point especially to be noticed because, prior to the 23d of May, neither Mr. Coolidge nor Mr. Thorndike, although they knew of course of the existence of the Burlington road, knew any thing of the defendant or that it held the road or its bonds for sale or under control. (R. p. 37, l. 25; p. 44, ll. 23–28.) The plaintiff had also originated and carried on negotiations between them for the sale of the bonds under the circular; he had originated the idea of obtaining from Mr. Schofield the authority to sell the completed road; he had originated and carried on negotiations between the parties for the purchase of this completed road; he had brought the parties to that point where the defendant had the power and was ready to sell, and Mr. Coolidge was ready and intended to buy, provided only the price asked was not too high; and there was no danger of the parties failing to agree on price because the company was sure of such an extremely large a profit under its arrangement with Mr. Schofield that it could well afford to meet Mr. Coolidge on almost his own terms. Mr. Short himself evidently regarded the transactions as practically ended, for he wrote to the plaintiff on Saturday, the 29th: "*Mr. Coolidge evidently intends to buy our road. We are masters of the situation.*"

At this stage of the proceedings, in order to quicken the negotiations, the plaintiff proposed to send for Mr. Short, (R. p. 49, ll.

25–26) and on Saturday the 29th and on Monday the 31st, he did send for Mr. Short. On Tuesday, the 1st, Mr. Short wrote that he would come to Boston in consequence of his request and also in response to Mr. Coolidge's request as conveyed to him by the plaintiff; and on the 2d and also on the 9th of June, Mr. Short actually came to Boston and the price to be paid for the road was agreed upon between the parties, and the contract for sale executed on the 10th of June, as previously stated.

Of course Mr. Short, on his arrival in Boston, as the plaintiff's superior officer, took precedence in the negotiations; but to suppose that this fact could deprive the plaintiff of commissions on business transacted in his division, would be to make the plaintiff's contract perfectly valueless and to expose him at any moment to be deprived of his just compensation by the premeditated appearance on the scene of another officer. It would be absurd to suppose that the parties intended to reserve the power to the defendant to deprive the plaintiff of his agreed compensation on business transacted in his interest by sending an officer from New York to take a single step in the transaction whenever the amount in issue was worth the expense of the journey.

To the Fourth Point.

On page 27 of the defendant's brief it is said:

"On page 51 of the record it will be seen that the plaintiff, at the conclusion of his testimony, expressly stated that he rested his claim entirely upon the contract."

As a matter of fact, the plaintiff stated nothing of the kind. What he said was that the work was "done under the contract"—a very different statement, and one that is considered at length in the plaintiff's brief, pages 85–86. What the plaintiff claimed is best shown by his declaration.

On the same page it is said:

"It also appears that when he closed his case he had not even attempted to prove the value of his services, and there was absolutely no testimony from which the jury would have been justified in inferring the value of his services."

On the contrary, he had put in the strongest possible evidence of this point, viz.:

First, That the defendant had itself valued them at one-third of the profits resulting from these services, and had made (or attempted to make) a written contract on that basis.

Second, That these services had earned for the defendant ever $79,000 on one transaction.

On page 28 of the defendant's brief it is attempted to show that the services rendered were rendered as director *only*. This attempt is futile, for on the defendants own statement of the case he is a *paid officer* and regularly titled "Assistant Vice-President" of the compan. Moreover, he is also the manager for the company of the Boston office (R. p. 24, ll. 32, 33) and the "Boston Agent" (R. p. 26, l. 38.)

See the brief of the plaintiff in error, page 19.

The simple fact that the defendant was to pay him *something* for his services (which is admitted) entirely destroys the defendant's position that he was acting purely as an unpaid director, and doing only what every director was obliged to do.

The charter imposes no special duties on the directors. It merely gives them certain powers.

The law *does* imply a promise to pay a director for extraordinary services, and it also implies a promise to pay for services previously agreed to be paid for.

See cases cited in page 77 of the brief of the plaintiff in error.

The first three cases cited are considered in the plaintiff's brief, p. 77, pp. 28-9, p. 56. The remaining case of *Butts* v. *Wood*, 37 N. Y. 317, is an attempt by an officer to obtain from a corporation higher pay than his contract provided for. Incidently, the case makes strongly for the plaintiff; for the contract contained in the resolution provided "that his compensation should be one per cent. of the receipts of the company and fifty cents per week in addition." This provision for compensatien, which is the same in principle as that in the contract of 17th December, was upheld in the case.

To the Fifth Point.

To the First Sub-Point, viz.:

"The Court must deal with the contract as if it had been actually made while the plaintiff was a director of the defendant company."

Under this point the defendant cites four cases. None of them support it.

Gilman, &c. *R. R. Co.* v. *Kelly*, 77 Ill. 426, merely decides the obvious point that a director cannot be personally interested on both sides of a construction contract made by his company.

Thomas v. *Brownsville, etc., R. R. Co.*, 1 McCrary, 392, is a case where directors were bribed to vote for a construction contract, and became personally interested in the same contract. See the brief of the plaintiff in error, page 54.

Wardell v. *R. Co.*, 4 Dillon, 330, was a case of "gross fraud" in fact. See brief of the plaintiff in error, page 56.

In *R. R. Co.* v. *Poor*, 59 Me., 270, the declaration alleged a wrongful act on the part of the corporation itself in transferring stock. The court sustained a demurrer to the declaration.

The statement that the contract required that the plaintiff should be elected a director before the contract could go into effect is not sustained by the facts. It was a condition precedent that he should become a stockholder, but not that he should become a director. As a matter of fact the contract was half performed before the plaintiff was elected to that office.

To the second Sub-Point.

This point is not in issue here and therefore is not discussed. The cases cited under it, not already considered, are:

Verplanck vs, Mercantile Ins. Co., 1 Edw.,Ch. 84. This case is chiefly a consideration of the equity jurisdiction of a New York court, called up by alleged misappropriation of the funds of the company by one of its officers.

The York etc. R. Co. v. *Hudson*, 16 Beavan, 485, is a case of fraudulent conversion by trustees, to their own use, of shares given them to hold in trust.

The case of *Aberdeen R. R. Co.* v. *Blaikie*, 1 Macqueens R., 461, decides that a director cannot be interested on both sides of a purchasing contract made by his company.

Hoyle v. *Plattsburgh R. R. Co.*, 54 N. Y., 314, is a decision on the purchasing rights of a person standing in the relation of a trustee for sale.

To the Third Sub Point.

On page 30 of the defendant's brief, it is said:

"Even if a contract between a corporation and one of its directors is fair and reasonable in all its provisions, yet the corporation has an unqualified right to repudiate the same at any time."

This proposition is entirely unsound. It is best answered in the words of the learned Judge himself who tried this case:

"A director of a corporation is not absolutely prohibited by law from entering into a contract with the corporation through his co-directors. The validity of such a contract must . depend upon the nature and terms of the contract itself and the circumstances under which it is made." (R. p. 56, ll. 3-5, 11-13.)

It is scarcely necessary to add that the cases cited by the learned counsel for the defendant do not support his statement. The cases cited, not already mentioned, are as follows:

Parson vs. *Concord R. R. Co.*, 13 Am. and Eng. R. R. Cases ~~considered~~ 102. This case treats of the purchasing powers of a trustee for sale, and decides that it is ultra vries of a railroad company to purchase a controlling interest in another railroad company for the purpose of controlling it.

iMichoud v. *Girod*, 4 How. 503, is another decision on the purchasing power of a trustee for sale, and treats of the rights of an executor.

Cook v. *Sherman*, 20 Fed. Rep. 168. This decides that a trustee cannot make a bargain with his cestuique trust without making a full disclosure. This court is especially referred to the cases on pages 182 and 183 of this report.

Twin Lick Oil Co. v. *Marbury*, 91 U. S. S. 87. This was a case of a fair and reasonable contract made by a director with the corporation, which the corporation attempted to repudiate on the principle laid down by the learned counsel for the defendant. This court held however, that such a contract could not be repudiated, and was valid originally.

Stewart v. *Lehigh Val. R. R. Co.*, 38 N. J. L., 505. A portion of the sixth head note to this case comes nearest to supporting the position of the learned counsel for the defendant. The decision however does not support this head note, the court, on p. 522, merely saying, of a contract made by a director with his company, and in which he was interested adversely to the company, that it "is not void, but voidable, to be avoided at the option of the cestui que trust, *executed within a reasonable time.*'

It seems superfluous to add that after a cestui que trust of sound mind and full age has executed such a contract and received all the benefit of it, the reasonable time to avoid it is passed. See brief of the plaintiff in error, pages 64-78.

To the fourth Sub-Point.

This is: "An examination of the contract will show that it is unreasonable and unjust, and places the private interests of the plaintiff in conflict with the interests of the defendant company and its other shareholders."

If this refers to profits coming as a bonus from a person contracting with his company, it is undoubted law. If it refers to payments made to a director by his company, none of the cases support the proposition. The only cases cited besides those already considered, are: *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715, which was a case where directors "fraudulently abstracted" the corporate seal, and made a mortgage to themselves instead of exercising their power honestly to pay the debts of the company.

The Great &c. Railway Co. v. *Magney*, 25 Beavan, 592. This is a leading case upholding the undoubted rule that a director cannot *take advantage of his official position and influence* to secure a bonus to himself adversely to the interests of his company. The plaintiff asks for no better statement of his rights than that given by Sir John Romilly, Master of the Rolls. In giving his opinion in the case, he says, in page 595: "I proceed to explain what I mean by the proposition, that an agent or a trustee cannot retain any benefit for himself from such a transaction. . . . When it is said that he cannot make any profit by the transaction, *it is not meant that he is not to have the proper value of the property which is actually taken and adopted by the company; nor does it mean that he is to give up his own property to the company* . . . Though he

never paid any money for the property, still he is . . . equally entitled to the beneficial interest, *and to be paid for the property if it be taken away.*"

On the same page ~~he says:~~ of the brief it is said:

"We have made a careful examination of all the authorities bearing upon this subject; and we find that the courts have uniformly held that the relations of a director or trustee to the corporation and its shareholders is such as to effectually preclude him from deriving any profit from the business of the corporation, except such as he receives in common with all its other shareholders."

The plaintiff is precluded from commenting on any of these cases by the fact that the learned counsel cites ~~more~~ none of them. But, inasmuch as the case of a director, who is also a paid officer, is either a direct contradiction to the defendant's position, or an obvious exception to it; and, inasmuch as the case at bar is precisely such a case, the omission is perhaps less material.

To the Fifth Sub-Point:

The question of "conflict of ~~intents~~ interests" between the plaintiff and the defendant, or its shareholders, has been fully considered in the brief of the plaintiff in error, pages 34-57. It is only necessary to add here that the learned counsel for the defendant, on page 32, evidently confuses *gross receipts* with *gross profits.*

The *gross receipts* of any particular transaction are the total amount received on that transaction; e. g., the $393,400 received by the defendant from the Atchison Company in payment for the Burlington Railroad and bonds.

The *gross profits* on any transaction are the gross receipts, diminished by all payments and expenses incurred on *account of that particular transaction.* Thus the gross profits on the transaction in question were the gross receipts, $393,400, diminished by the sum total of all expenses and payments made on account of this particular piece of business; e. g., the sum paid to Mr. Schofield, the sums paid to the pledgees of the old bonds, the expenses of legal searches, of foreclosure, etc., — in a word, all the expenses men-

tioned by the claim and on pages 125 and 32 of his brief — leaving as gross *profits of this particular transaction* the sum stated by the defendant at something over $79,000. This profit was to measure the plaintiff's pay.

The *net profits* of any transaction, that is, the ultimate profits over and above *all* outputs,—in other words, the *sum applicable to dividends*, are of course the gross profits on that transaction, diminished by its proper proportion of the *general running expenses of the Company*; e. g., taxes, salaries, office rent, clerk hire, etc.

The concluding argument of the defendant, that a creditor of a corporation who is also a stockholder, loses his debt if he receives a dividend, is indeed a novel one. It has already been pointed out (Brief of plaintiff in error, pages 49-50), that the plaintiff has no claim on any *specific* sum of money or profits. The total of these profits is merely the *measure* by which his salary is ascertained. Of course, if some of the money that was due to him was erroneously added to the dividend fund, all the stockholders (and the plaintiff among them) received a dividend too large by that amount. When the debt has been paid, all the stockholders (and the plaintiff among them) will receive a dividend smaller by the same amount, and the error in the earlier dividend is thus corrected. If any stock has changed hands in the meantime, it is immaterial, for stock passes only subject to existing rights.

Respectfully submitted by

ROBERT DICKSON SMITH,
WILLIAM WARREN VAUGHAN,
of Counsel for the Plaintiff in Error.

119-696

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886. No. 103.

LUCIUS L. HUBBARD,

Plaintiff in Error,

vs.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY,

Defendant in Error.

DEFENDANT'S BRIEF.

HUGH PORTER,
Defendant's Counsel,
No. 11 Pine Street,
New York City.

Supreme Court of the United States.

LUCIUS L. HUBBARD,
Plaintiff in Error,

vs.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY.

Brief for Defendant in Error.

Statement of the Case.

This is an action at law and comes up on writ of error to the Circuit Court of the United States for the District of Massachusetts.

The defendant is a corporation duly incorporated under the laws of the State of Illinois. Its charter will be found upon page 58 of the Record, and for convenience of reference we here insert it. It is as follows:

"An act to incorporate the Edgar County Land and Loan Company.

"SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that James A. Eads and Calvin W. Levings, their associates, heirs and assigns, and all such persons as shall become stockholders in the corporation hereby created, and their successors, shall be a body politic and corporate by the name and style of the 'Edgar County Land and Loan Company,' shall have a common seal, may sue and be sued, make contracts, and have and exercise all the powers and privileges and be subject to all the liabilities of a body corporate and politic, and shall be located at

"SEC. 2. The capital stock of said company shall be one hundred thousand dollars, and shall be subscribed and paid for in the manner prescribed by the by-laws. It shall be divided into shares of one hundred dollars each, to be deemed personal property and transferable as such on the books of the company in such manner as the by-laws may prescribe. The capital stock may be increased from time to time to an amount not exceeding two hundred thousand dollars. Each share of stock shall entitle the holder thereof to one vote for the purpose of increasing the capital stock.

"SEC. 3. The said corporation shall have power to borrow money and to receive money in deposit and pay interest thereon, and to loan money either within or without this State, at any rate of interest not exceeding that now or hereafter allowed by law to private individuals, and to discount loans, and in computation of time thirty days shall be a month and twelve months a year, and to make such loan payable, either within or without this State, and to take such securities therefor, real and personal, or both, as the directors or managers of said corporation shall deem sufficient, and may secure the payment of such loans by deeds of trust, mortgages or other securities, either within or without this State, may buy and sell negotiable paper or other securities, may open and establish a real estate agency; may purchase and sell real estate, and shall have power to convey the same in any mode prescribed by the by-laws of such corporation; may accept and execute all such trusts, whether fiduciary or otherwise, as shall or may be committed to it by any person or persons, or by order of any court or tribunal or legally constituted authority of the State of Illinois, or of the United States or elsewhere; may make such special regulations in reference to trust funds or deposits left for accumulation or safe keeping as shall be agreed upon with the depositors or parties interested, for the purpose of accumulating or increasing the same. May issue letters of credit and other commercial obligations, not however, to circulate as money, and may secure the payment of any loan made to said company in any way the directors may prescribe.

"SEC. 4. Married women and minors may, in their own names, subscribe for stock and deposit money with said corporation, and receive certificates of stock and deposit in their own names, which stock and deposits shall be subject to their order and disposal only.

"SEC. 5. It may be lawful for the company to purchase

and hold such real estate as may be convenient and useful for the transaction of its business, and also to take and hold any real estate in trust, or otherwise, for or in payment of loans and debts due and to become due to said company, to bid for and purchase any real estate at any sale, whether made in virtue or on account of any loan or mortgage, or trust made to or held by, or for said company, or in which it is interested, or otherwise, and to receive the satisfaction of any loan or debt, any real or personal estate, and to hold, use, lease and convey the same.

SEC. 6. The affairs of the company shall be managed by a board of directors, at least three in number, who shall hold their office for one year and until their successors are elected and qualified: the directors shall have power to appoint other officers and agents, and prescribe their duties, and they may fill vacancies that may occur in the board of directors. The directors shall have power and authority to make by-laws, rules and regulations for the government and well ordering of the business affairs and officers of said company. They shall have the right and power to determine the time and manner in which installments upon capital stock shall be paid, and may declare forfeited any share or shares of stock on which remains due and unpaid any such installments for the period of thirty days, to gether with all sums paid thereon, or at their option may sue for and recover the entire amount of subscription remaining unpaid.

"SEC. 7. The stockholders herein shall be responsible in their individual property, in double the amount of their stock, to make good all losses to depositors or others, and no assignment of their stock shall release them from said liabilities until after the fact of such assignment and name of the person to whom made and the amount of said stock shall have been advertised in some public newspaper printed in the county where this corporation is doing business and located, for the period of three months.

"SEC. 8. This act shall be void unless said company shall organize and proceed to business within two years after the passage hereof.

"The said company shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust or deposit companies.

"SEC. 9. This act shall be deemed and taken to be a public act, and be in force from and after its passage."

"Approved March 8, 1867.

On the 17th day of December, 1879, a certain agreement in writing was entered into by and between the plaintiff and the defendant, a copy of which will be found on page 10 of the record, and which we also here insert.

This memorandum of agreement, made the 17th day of December, A. D. 1879, by and between the New York, New England and Western Investment Company, a corporation duly organized and established under the laws of the State of Illinois, party of the first part, and Lucius L. Hubbard, of Cambridge, Mass., party of the second part, witnesseth:

That, for and in consideration of the premises hereinafter contained by the said party of the first part, to be well and truly kept and performed, the said party of the second part hereby agrees to open and take charge of a branch office of said corporation at Boston, Mass.; to devote his best energies and time to the interests of said corporation as far as may not be inconsistent with a due regard for the interests of such legal clients as he may have from time to time, always considering his duties toward said corporation as of the utmost importance, to use his best endeavors to place in New England, where it may be of greatest advantage to said corporation, twenty-five thousand dollars ($25,000) of the capital stock of said party of the first part, and generally to do and perform (within his "division" so-called) all legal acts for the furtherance of the interests of said party of the first part as shall be consistent with honor, honesty, equity, and fair dealing.

In consideration of the foregoing promises by the said party of the second part to be well and truly kept and performed the said party of the first part hereby agrees forthwith to elect said party of the second part one of its directors with the title of

assistant vice-president, to give said party of the second part the direction of said office designated as the eastern division, subject, of course, to the by-laws of said corporation now in force or hereafter to be enacted; to furnish said office and its furniture, all the books, signs, circulars and advertising, which said corporation may require; to pay the salary of its bookkeeper, and of such other employes as may be deemed necessary and proper, and generally to pay the running expenses of said office; to pay to said party of the second part the sum of eighteen hundred dollars ($1,800) per year as "salary" together with all expenses of travel incurred by him on its behalf, and a further amount as "commissions" to be determined as follows, to wit.: All business originating in said "eastern division," which shall include the whole of Maine, New Hampshire, Vermont and Massachusetts, or transacted at said Boston office, shall be "valued" according to the amount of gross profit coming therefrom to said corporation, or which can be rightly claimed by it. After deducting from the aggregate of such profits for each year the sum of fifty-four hundred dollars ($5,400), plus the amount of bookkeeper's salary, said party of the second part shall be entitled to one-third ($\frac{1}{3}$) of the balance as commissions as above. Settlements shall be made between said parties as often as once a month, said party of the second part becoming entitled to said "commissions" *pro rata* as soon as the same shall have been earned and received, and shall exceed in the aggregate the amount of $5,400, plus salary of bookkeeper as above set forth and shall be paid "in kind."

Said party of the first part shall favor as much as practicable said Boston office to the end that parties within its precincts may deal directly with it. All legal services required by said party of the first

part for itself or others in suits or proceedings in Court, or in the drawing of railroad deeds and mortgages shall be entitled to extra compensation from said party of the first part.

It is mutually understood that the best interests of the corporation will be furthered by handling only first-class securities, and that the fullest information shall be furnished said party of the second part from time to time at his request to the end that he may not be asked or required to place on the market any security, which from its doubtful character might thereafter reflect on the credit of said party of the first part or of its officers.

This agreement shall go into effect from and after the sale and purchase by said party of the second part at par of ten thousand dollars ($10,000) of the capital stock of said party of the first part and payment therefor, and shall be in force for one year, at the end of which time there shall be a general accounting together of said parties, and a new agreement may be made and entered into if the mutual interests of said parties may so require.

In witness whereof the said parties have hereunto set their hands, said party of the first part by its President, thereunto, duly authorized the day and year first above written.

THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT COMPANY,
BY J. C. SHORT, Pt.
LUCIUS L. HUBBARD.

December 24th, 1879, the plaintiff purchased ten thousand dollars of the capital stock of the defendant company, paying for it at par. Immediately thereafter he opened in Boston a branch

office of the defendant company. On the 27th day of December, 1879, the plaintiff was elected a director of the defendant company and also appointed its assistant vice-president. All these acts were performed by the respective parties, pursuant to the terms of the said contract. (See pages 33 and 34, folios 76 and 77 of Record.)

June 5th, 1880, the plaintiff was elected a director by the stockholders at their annual meeting in Chicago, Illinois.

Prior to the month of June, 1880, the plaintiff attended several meetings of the Board of Directors of the defendant company, and took part in the management of its affairs. (Folios 76 and 77 of Record.)

The plaintiff was duly paid the sum of eighteen hundred dollars for his services during the year fixed by the said contract, and was also reimbursed for all outlays made by him, as provided in the said contract, and the defendant paid all the other expenses of the Boston office, pursuant to the terms of said contract.

During this year the plaintiff rendered monthly accounts to the New York office, as required by the contract. In none of these accounts did he claim that the sale of the Kansas City, Burlington and Santa Fe Railroad property was transacted at the Boston office or originated there; or that he was entitled to any portion of the profits of that transaction. (Page 36 of Record.)

Prior to May 15th, 1880, the defendant had entered into a contract with the Kansas City, Burlington and Santa Fe Railroad Company for the sale of the bonds and other property of that road, or of that company. In order to place this property before other railroads and investors, the defendant company had prepared a circular, describing the said property and offering it for sale

(page 36, folios 82 and 83, and page 43, folio 99).

On the 14th of May, 1880, a bundle of these circulars were sent by post by the defendant to the plaintiff for distribution (page 36, folio 83 of record).

This business was procured, the contracts made and the circular prepared by the defendant company at its New York office.

The plaintiff had nothing, whatsoever, to do with the procuring of the same or the making of the contract or the preparation of the circulars, and knew nothing of the existence of the business until he received the bundle of circulars sent him by post, as above stated. (Page 36, folios 82 and 83, and page 43, folio 99 of record.)

On Sunday the 25th day of May, 1880, while returning from church, the plaintiff had a short conversation with S. L. Thorndyke, the Comptroller of the Atchison, Topeka and Santa Fe Railroad Company, a corporation organized under the laws of Kansas, whose lines of railroad and home offices were in Kansas; at that conversation, the plaintiff referred to the issuing of the circular above stated and asked Mr. Thorndyke whether his company had taken any action to get the Kansas City, Burlington and Santa Fe Railroad Company out of the way. Mr. Thorndyke said in reply that that company had been mentioned at the meeting of the stockholders of his company, but that nothing had been done. (Pages 36 and 37, folio 83 of Record.)

It further appears that previous to the 23d day of May, 1880, Mr. Watson, the secretary of the defendant company, had had an interview in Kansas with a Mr. Strong, who was then the general manager of the Atchison, Topeka and Santa Fe Railroad, and had offered the bonds and stocks of the Kansas

City, Burlington and Santa Fe Railroad to Mr. Strong on behalf of his company, and that Mr. Strong had called the attention of his company to the matter. (Page 46, folio 106 of Record.) At this time Mr. Strong was one of the defendants stockholders. (Page 32, folio 72 of Record.)

As above stated, the plaintiff had his first interview with Mr. Thorndyke on Sunday, May 23d. On Monday, May 24th, Mr. Thorndyke called on the plaintiff at the Boston office of the defendant and asked for a copy of the circular above referred to which was given to him. On Tuesday, May 25th, the plaintiff mailed to the defendant company an account of these interviews. (Page 37, folios 84 and 85 of Record.) On Wednesday, May 27th, the plaintiff had an interview with Mr. Coolidge, the President of the Atchinson, Topeka and Santa Fe Railroad Company (page 47, folio 108), and on the same day informed the defendant of the same by mail, advising the defendant in effect that no sale could be made to that company. (Page 38, folio 88 of record.)

On the same day, however, a Mr. Worden, a banker of New York City, called at the office of the defendant company and opened negotiations for the purchase of the property in question directly with the company, in the city of New York, stating that he represented the Atchison, Topeka and Santa Fe Railroad Co. On Thursday, May 28th, the defendant reported this fact to the plaintiff, and instructed him to do nothing more in the matter. (Pages 39 and 40, folios 90 and 91 of Record.)

On the 3d day of June, John C. Short, the president of the defendant company, and Wm. H. Schofield, the President of the Kansas City, Burlington and Santa Fe Railroad Company, visited Mr. Coolidge,

at his request, at his office, in the city of Boston, for the purpose of effecting, if possible, a sale of the property in question to the first-named railroad company; the plaintiff was present at that interview, but said nothing. (Page 50, folio 114.)

On June 10th, another interview took place at the same office, between Mr. Coolidge, Mr. Short and Mr. Schofield, at which an agreement, in writing, was prepared and signed by Mr. Coolidge, Mr. Short and Mr. Schofield, on behalf of their respective corporations. (Page 50, folio 114 of Record.)

The plaintiff was not present at this interview. (Page 50, folio 114 of Record).

The agreement will be found at page 9 of the Record. It is as follows:

MEMORANDUM.

BOSTON, June 10, 1880.

The Atchison, Topeka, and Santa Fe Railroad Company will pay nine thousand (9,000) dollars per mile of main track for the Kansas City, Burlington and Santa Fe Railroad, including all depots, rolling stock, all materials on hand, water tanks, side track, turn-tables, machine shops, with tools belonging thereto in short all appurtenances of every description belonging to the road.

The Atchison, Topeka and Santa Fe Railroad Company shall have time to examine the title to the property, and, if without unreasonable delay, it can acquire a satisfactory title, then by the twenty-fifth of June, 1880, it agrees to pay three hundred and forty-three thousand dollars to the New York, New England and Western Investment Company, at its office in the City of New York, on receipt of five hundred and ninety of the first-mortgage eight per cent bonds and a majority, not less than thirty-three hundred and ten shares, of the capital stock of the Kansas City, Burlington and Santn Fe Railroad Company, together with all the bonds and stock issued under the circular dated May fifteenth, 1880, together with a satisfactory conveyance and transfer of the charter and franchises of the Kansas City, Burlington and Southwestern Railroad Company, the total issue of said first mortgage eight per cent. bonds being six hundred thousand dollars.

The Atchison, Topeka and Santa Fe Railroad Company is to pay seven hundred dollars flat on delivery thereafter for each of the ten bonds not delivered as aforesaid, said bonds to be furnished by January first, 1881, with all coupons.

The balance of the purchase-money is to be paid with six per cent. interest from the date of said payment of three hundred and forty-three thousand dollars, when the road has been foreclosed at the instance and expense of the New York, New England and Western Investment Company, and no claim of any kind can be made against the said railroad, tracks, depots, rolling-stock, materials, tanks, turn-tables, shops, tools and other appurtenances first hereinbefore described in the hands of the purchaser. And in case a good title free of all liens and claims cannot be given at the date of said foreclosure, then to pay the said sum as soon as such title can be given under foreclosure if such title is given within three years of this date; if not all further obligation on the part of the Atchison, Topeka and Santa Fe Railroad Company shall cease and determine.

The Atchison, Topeka and Santa Fe Railroad Company and Mr. Short are to assist in obtaining the foreclosure. President Schofield and the New York, New England and Western Investment Company agree on the receipt of the first payment to cause the resignation of a majority of the present Board of Directors of the Kansas City, Burlington and Santa Fe Railroad Company, and to put in their place nominees of the Atchison, Topeka and Santa Fe Railroad Company, and to cause the resignation of the present Board of Directors of the Kansas City, Burlington and Southwestern Railroad Company and to put in their place nominees of the Atchison, Topeka and Santa Fe Railroad Company.

The New York, New England and Western Investment Company will sell said Kansas City, Burlington and Santa Fe Railroad, its property and appurtenances, bonds and stock, and Mr. Schofield agrees to convey the charter and franchises of the Kansas City, Burlington and Southwestern Railroad Company in the manner and on the terms aforesaid.

By order of the Committee.

T. JEFFERSON COOLIDGE,
President A., T. & S. F. R. R. Co.

WM. H. SCHOFIELD,
President Kansas City, Burlington and Santa Fe Railroad Company.

J. C. SHORT,
P't N. Y., N. E. and W. Investment Company.

June 13th all of the parties met at the office of the defendant company in the city of New York, the plaintiff, however, not being present; and at that meeting another agreement in writing was made. This agreement purports to have been made by and between the Atchison, Topeka and Santa Fe Railroad Company of the first part, the defendant company of the second part, and Alden Speare, Charles S. Tuckerman, and Lucien M. Sargent, but so far as the record shows it was only executed by the railroad company, the defendant company, and Alden Speare.

By this agreement the defendant company undertook to foreclose at its own expense certain mortgages on the property of the Kansas City, Burlington and Santa Fe R. R. Co.'s property, and also to do various other acts evidently requiring the performance of much labor and the expenditure of considerable money.

This agreement will be found on page 15 of the record, but for convenience of reference we here insert it:

> This agreement made the 13th day of June, one thousand eight hundred and eighty, by and between the Atchison, Topeka and Santa Fe Railroad Company of the first part, the New York, New England and Western Investment Company of the second part, and Alden Speare, of Newton, Charles S. Tuckerman, of Salem, and Lucien M. Sargent, of Boston, and all in the commonwealth of Massachusetts, of the third part, witnesseth:
>
> That the said New York, New England and Western Investment Company in consideration of one dollar and other valuable considerations to it paid by the parties of the third part, the receipt whereof is hereby acknowledged, hereby covenants and agrees with the parties of the third part—
>
> *First.*—That no stock or bonds have been issued under the circular of the New York, New England and Western Investment Company as financial agents of the Kansas City, Burlington and Santa Fe Railway Company, dated May fifteenth, 1880, and that no rights have been acquired to stock or bonds by subscription pursuant to said circular.

Second.—That the total issue of the eight per cent. first mortgage bonds of the Kansas City, Burlington and Santa Fe Railway Company does not exceed six hundred thousand dollars, and that the capital stock of said last named company does not exceed fifty-seven hundred [and] twenty-five shares, of one hundred dollars each.

Third.—That said Investment Company will forthwith procure at its own expense the foreclosure of all the mortgages on the property of the Kansas City, Burlington and Santa Fe Railroad Company, except the mortgage for eleven million dollars, dated January first, A. D. 1880, for the benefit of the bondholders and of the parties of the third part and their assigns, and further will procure and cause to be conveyed to said parties of the third part, or their survivors, or survivor, or assigns within three years from this date a good title, free from all claims, liens, and incumbrances to the railroad already constructed of the Kansas City, Burlington and Santa Fe Railway Company, commencing at or near the city of Ottowa, in Franklin County, Kansas, and running thence via Williamsburgh to the City of Burlington, in Coffey County, including all branches and tracks, side tracks and depot grounds, all depots, station-houses, engine-houses, car-houses, freight-houses, grain, wood and coal houses, machine shops or other buildings, water tanks, turn-tables, offices, also all the real estate, rights of way, rolling stock, materials now on hand, tools, chattels, rights, title, franchises and interests of the said Kansas City, Burlington and Santa Fe Railway Company, including all the rights, titles, franchises, property and interests of the said Railway Company in the entire road constructed or being constructed between Kansas City and Santa Fe.

And it is further agreed that all and singular the said first mortgage bonds transferred to said parties of the third part shall by them, or their assigns, on request, in writing, of said investment company, be delivered or caused to be delivered to the officer who may sell said railroad or other property, or any part thereof, under any decree of foreclosure or judgment, obtained by said investment company, its authorized agents or attorneys, in performance of this the third article of this agreement; said bonds to be so delivered to said officers in payment in behalf of the parties of the third part for said railroad and other property which may be so sold at such judicial sale pursuant to this article; but said investment company shall pay all costs, attorney's fees or other cash payments necessary in making such foreclosure, or taking other proceedings in execution of this article, and like use may be made of the notes transferred

to the parties of the third part in the foreclosure of the real and chattel mortgages assigned to them, and in payment in their behalf for the chattels and real estate sold under such foreclosure.

Fourth.—That it will procure a satisfactory conveyance and transfer to said parties of the third part, on or before the first day of September, 1880, of the charter and franchises of the Kansas City, Burlington and Southwestern Railway and Telegraph Company, and will likewise procure on or before said date the resignation of a majority of the directors of said last-named company and the election in their stead of persons to be nominated by the parties of the third part.

The said Atchison, Topeka & Santa Fe Railroad Company and said parties of the third part agree that they will promote said foreclosure and that the bonds held by the parties of the third part may be used in said foreclosure and in the purchase of said road at any foreclosure sale; and said Atchison, Topeka and Santa Fe Railroad Company agrees that whenever the title to said railroad and other property hereinbefore agreed to be conveyed shall be vested in said parties of the third part, their survivors or survivor or assigns free of all liens and claims whatsoever, as aforesaid, it will pay to said New York, New England and Western Investment Companies the sum of thirty-eight thousand and six hundred dollars, with interest thereon at the rate of six per cent. per annum, from the 25th day of June, in the year 1880, and if on measurement of the main track of said Kansas City, Burlington and Santa Fe Railroad Company it should be found to exceed in length forty-two and four-tenths miles, said Atchison, Topeka and Santa Fe Railroad Company agrees to pay a further sum in addition to said sum of thirty-eight thousand six hundred dollars, equal to nine thousand dollars per mile for each mile or part of a mile of such excess on the vesting of said title aforesaid.

Provided, however, that if from any cause whatsoever said title shall not be vested in said parties of the third part, or their survivors or survivor, or assigns, free from all liens and claims, within three years from this date, all liability on the part of the Atchison, Topeka and Santa Fe Railroad Company to pay said sum of thirty-eight thousand and six hundred dollars, and any sum in addition to the same or any part thereof, shall cease and determine.

The said parties of the third part further agree to pay to said New York, New England and Western Investment Company, on or before the first day of January, 1881, on delivering to said parties of the third part of the remaining eight per cent. first mortgage bonds of the Kansas City,

Burlington and Santa Fe Railway Company not this day transferred to them seven hundred dollars flat for each of said bonds as they shall severally be delivered, and said New York, New England and Western Investment Company agree to deliver said bonds to said parties of the third part on or before said date.

In witness whereof the parties of the first part and second parts have caused their corporate names to be hereto subscribed and their seals to be affixed by their respective officers hereunto duly authorized and the parties of the the third part have hereto set their hands and seals the day and year first above written.

(Signed) THE NEW YORK, NEW ENGLAND AND WESTERN INVESTMENT CO.,
By J. C. SHORT, Pt.
(Signed) ALDEN SPEARE.

(Signed) THE ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.
By S. LOTHROP THORNDIKE [SEAL.]
Comptroller.

This agreement was intended to and did take the place of the agreement of June 10th.

In his declaration the plaintiff alleges, that the defendant company earned by the sale of the property above mentioned the sum of one hundred and seventeen thousand eight hundred and thirty-three and $\frac{33}{100}$ dollars gross profits. (Page 13, folio 29 of Record.)

This is denied by the defendant in its answer. (Page 18, folio 42 of Record.)

The only testimony in the case tending to show the gross profits earned by the defendant in the transaction in question is that to be found on page 51 of the Record, and is contained in the following statement, to wit:

"The gross profit accruing to the defendant from this sale were admitted by the defendant's treasurer in answer to interrogatories propounded by the plaintiff to be over seventy-nine thousand dollars."

After the making of the agreement between the defendant and the plaintiff, and prior to the said sale, the defendant had sold to various persons portions of its capital stock, and such persons were at that time still the owners of the stock so purchased by them. (Page 51, folios 116 and 117 of Record).

The plaintiff brought this action to recover one-third of the *gross* profits which he claims were earned by the defendant by the said sale.

On the first of July, 1881, the defendant declared a cash dividend of twenty per cent. on its capital stock.

In April, 1881, the defendant declared another cash dividend of twenty per cent., and a dividend payable in bonds of twenty per cent., and in July, 1881, a cash dividend of ten per cent. on its capital stock.

All of these dividends were duly paid over, and received by the defendant on the ten thousand dollars of the capital stock of the defendant owned by him.

The plaintiff admits that he knew that the dividends of July, 1880, and of April, 1881, amounting in the aggregate to sixty per cent. of the capital stock of the defendant were paid out of the gross earnings, which accrued to the defendant by reason of the sale of the property above set forth. (Page 52 of Record).

On July 2d, 1880, the plaintiff presented in writing to the defendant a claim for one-third of the gross profits accruing to the defendant by reason of the said sale. This claim was laid before the board of directors of the defendant company, and rejected by them as not

being within either the letter or the spirit of the contract between the plaintiff and the defendant. (Page 53, folios 120 and 121 of Record.) And thereupon, the plaintiff brought this action to recover the amount so claimed by him.

At the close of the plaintiff's evidence the defendant asked the Court to instruct the jury to render a verdict for the defendant, and thereupon the Court ordered the jury to return a verdict for the defendant, which was done.

The opinion of the Court will be found at page 55, folio 125 of the Record, and we insert it here also.

NELSON, J. (*Orally*) I have taken the question that was argued yesterday into consideration, and I am now ready to announce my ruling.

The contract upon which the plaintiff's case is founded provides that the plaintiff was to be chosen one of the directors of the defendant corporation. It had in contemplation by its express terms that he was to be invested with the duty of superintending and directing its affairs as one of its directors, and was to have that relation to the company and its stockholders while he was performing his part of the contract. The contract, must therefore, be construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director.

A director of a corporation is not absolutely prohibited by law from entering into a contract with the corporation through his co-directors. Whether such a contract is binding upon the corporation must depend upon its terms and the circumstances under which it was made. Owing to the peculiar relation which the directors owe to the corporation, being strictly trustees, and their position being in every sense fiduciary, their contracts with the corporation should be scanned, if not with suspicion, at least with the most scrupulous care. The validity of such a contract must, therefore, depend upon the nature and terms of the contract itself and the circumstances under which it is made.

The motives of the parties are not necessarily material, but the effect of the provisions of the contract must be especially regarded, and if they are pernicious and tend to

work a fraud on the rights of the corporation and stockholders, in such case the directors must be regarded as having no authority to enter into it.

In entering into this contract, I perceive no evidence in the case from which to infer that either the plaintiff or the board of directors had any purpose to perpetrate a fraud on the corporation, or to grant to the plaintiff any undue privileges; but still, if that was the effect of the contract, it cannot be maintained.

In passing upon the question whether the directors had authority to make this contract, I must assume its true construction to be what the plaintiff claims it is, and to embrace commissions to the amount which the contract itself provides upon the contract upon which the Burlington railroad was sold to the Atchison company. Now, it seems to me, in examining this contract, that there is very strong reason to conclude that the parties never had in contemplation the meaning which the plaintiff now contends should be given to it.

It seems to me that the contract was intended by the parties to relate to a different class of transactions from that which is set forth in the declaration, as the breach of the contract upon which the plaintiff relies to maintain his action. They established by this contract a division, comprising four of the New England States, with an office in Boston, and placed the plaintiff at the head of the Boston office, intending to give to him the business originating and transacted within the four States.

Now it appears that the business which culminated in the sale of the railroad to the Atchison company was a business which had originally come to the New York office. All plaintiff did after the business had come to the New York office was this: He introduced the company to an agent of the Atchison railroad, who resided in Boston. He made no contract between the Investment company and the Atchison road for the sale of the Burlington road. His sole services in respect to the business consisted of his conversation with Mr. Thorndyke, his interviews with Mr. Coolidge, the president of the Atchison road, and in making arrangements for a meeting between the directors of the company in New York and the agents of the Atchison road in Boston.

The contract itself was made and concluded, its terms settled, and the contract perfected by the New York directors, and not by the plaintiff. The plaintiff's claim here rests upon the assumption that the contract provided that he was entitled to his one-third of the gross profits resulting to the company upon this business, as his compensation

for his services rendered in this particular instance; and although I have great doubts whether that was a result which the parties intended, and was embraced within the meaning of this contract, yet I am bound, in construing the contract as the case now stands, and upon the evidence now before the Court, to assume that this particular business was within the terms of the contract.

If this contract is to be construed as granting to the plaintiff the enormous commission which he claims in this suit, one-third the gross profits of the company arising out of this transaction, without regard to the debts or the other liabilities of the company, I am of the opinion that it is a contract which the directors had no authority whatever to make with the plaintiff. The services which he actually performed seems to be simply that of a broker introducing a customer to his employer, through whom a contract was subsequently perfected. If the contract is to be construed so as to cover a transaction of that kind, it was one that was unreasonable as affecting injuriously the rights of the stockholders of the company, and giving one of the directors of the company a right, without regard to the rights of creditors, to say nothing of the rights of the stockholders in the assets of the corporation, giving him a profit without regard to the liabilities; and being of this nature, it was not a reasonable and fair contract for one of the directors of the corporation to make with his co-directors.

It might be very well claimed, if this contract related merely to a commission on sales actually effected through the Boston office by the plaintiff, or actually originated and perfected within the four New England States embraced by the contract, that it would not be an unreasonable one, provided the results of it were reasonable, not affecting the general prosperity and solvency of the corporation. But if it is to be construed as covering transactions of this nature, where the enormous profit realized in this case would be divided in the proportion of two-thirds to the corporation and one-third to the director, it seems to me to be unreasonable, and a contract that ought not to be sustained.

The services rendered by the plaintiff in this case were exceedingly slight. He met his friend, Mr. Thorndyke, and called his attention to the road, which the Investment Company had in its possession for sale. He subsequently communicated the result of these interviews to the directors of the Investment Company in New York, the result of which was that, subsequently, through the action of the New York directors alone, this road was sold to the Atchison Company, at a profit of something over $100,000. To

hold that a director could make a contract with his co-directors by which the gross profits on a transaction of that kind, and all transactions of a like nature, should be divided in the proportion in which it is claimed that this contract provides for, seems to me would be unreasonable, and ought not to be sustained.

In regard to the claim of the plaintiff on the count on an account annexed, I am also of opinion that there is no evidence in the case upon which this count can be sustained. Mr. Hubbard very fairly states that what he did was done under the contract. This count is for commissions on this particular transaction. Mr. Hubbard was not a broker; he does not claim to have acted in any sense as a broker between the parties, under any contract that he was to receive a commission for his services; and to hold that for the services which he rendered in this case he is entitled to recover any compensation, under the circumstances, seems to me to be altogether out of the question. He was not a broker; there was no express contract, and there are no circumstances from which it can be concluded that any kind of an implied contract existed between the Investment Company and the plaintiff, by which he was to have a commission on this transaction.

I am of the opinion that the defendant is entitled to a verdict.

First Point.

Assuming that the agreement entered into between the parties to this suit was, and is a good, and valid agreement, and binding upon the defendant company, yet an examination of its various terms and conditions will show conclusively that it was intended to cover a different class of transactions from that which is set forth in the declaration in this case.

By the terms of this contract the plaintiff agreed to open and take charge of a branch office of the defendant in the city of Boston, but this office was to be furnished, and all of its expenses, including the salary of the clerks there employed, were to be paid by the defendant.

The defendant was to pay the plaintiff a salary of eighteen hundred dollars a year for his services. The plaintiff expressly stipulated that he should be permitted to continue his law practice; and that he should not be asked to render any service to the defendant that would interfere with his law practice.

All legal services which the plaintiff should render to the defendant were to be paid for at the rates ordinarily charged by lawyers to clients for similar services.

The plaintiff, on his part, agreed to take charge of the said office; to devote his time to the interests of the defendant, so far as his so doing might not interfere with his legal practice; and also, that he would endeavor to sell in New England twenty-five thousand dollars of the capital stock of the defendant.

In other words, the plaintiff was furnished with an office and a clerical force, free of expense to himself, and paid a salary of eighteen hundred dollars a year and permitted to continue his law practice as he had been in the habit of doing, with the prospect of having it increased by being employed by the defendant Co. to render it legal service.

It is fair to assume that the parties understood that the plaintiff should make some return to the defendant for the benefits and advantages secured to him by the terms of said contract, and it seems clear that the services which the plaintiff rendered to the defendant in the transaction set forth in his declaration in this action were precisely such services as he was expected to render by the terms of the said contract without extra compensation.

The services rendered by him were exceedingly slight and were such as any paid clerk or employee of a corporation would render without looking for extra compensation.

After having received from the defendant copies of the circular which it had issued, offering the property for sale, he had two short interviews with Mr. Thorndyke, one of the officers of the Atchison, Topeka and Santa Fe Railroad Company, at the first of which he learned that the matter of the purchase of the property in question by that road had been already brought to its attention.

The first of these conversations occurred Sunday morning while the plaintiff was returning from church, and was in no sense a business interview. The second of these was brought about by Mr. Thorndyke himself, who called at the defendant's office in the City of Boston, and obtained a copy of

the circular already mentioned, which the plaintiff had neglected to send him.

All of the negotiations were carried on by the other officers of the defendant company, and the only services rendered by the plaintiff in the matter consisted of the interviews above mentioned, and those which he had with Mr. Coolidge, the president of the railway company, where the plaintiff acted simply as the messenger of the defendant to lay before Mr. Coolidge certain propositions originating in the New York office, and arrange a meeting between Mr. Coolidge and the president of the defendant company, and the president of the Kansas City, Burlington and Santa Fe Railroad Company.

In his letter of May 28, 1880, addressed to the defendant at its New York office, and which will be found on page 42 of the Record, the plaintiff defines his position in the negotiation when he says, "this talk of mine is of course rambling. I dare say *you* have by this time digested a plan or offer which we can lay before Mr. Coolidge, and which will meet all the requirements of the case on both sides."

If this class of services were not to be rendered to the defendant without extra compensation, then what was the plaintiff expected to do for the very substantial benefits which he received under his contract with the defendant?

Second Point.

By the terms of the contract, the plaintiff was to receive one-third of the *gross* profits earned by the defendant on two classes of business only. The

first was business "*originating*" in Maine, New Hampshire, Vermont and Massachusetts. The second was business "*transacted*" at the Boston office.

It cannot be seriously claimed that the business in question *originated* at the Boston office.

The New York office had secured the business without even the knowledge of the plaintiff. He first knew that the business had been secured by the defendant when he received from the defendant, for distribution, the copies of the circulars offering the property for sale, hereinbefore referred to.

The Kansas City, Burlington & Santa Fe road was entirely located in the State of Kansas, and not in any of the States comprising the so-called Eastern division.

It is evident that the clause in the said contract, to wit, "all business originating in said Eastern division, which shall include the whole of Maine, New Hampshire, Vermont and Massachusetts," simply means all business which shall be secured originally for the defendant by the plaintiff.

In other words, the plaintiff was to receive a salary and other substantial benefits for taking charge of the Boston office and attending to the general business of the company at that point, and if he personally, outside of the line of his general duties "originated" or secured new business for the company without the aid or assistance of the company, then he was to receive the extra compensation.

Third Point.

The words, "transacted at said Boston office," evidently means business, which, from its inception until its final completion, had been transacted at that office by the plaintiff.

Now, the business upon which the plaintiff bases his claim consisted in negotiating the sale of the property of the Kansas City, Burlington & Santa Fe Railroad Company in preparing the contracts, regulating the rights of the respective parties, procuring a delivery of the said property and in instituting and conducting to a successful conclusion within a limited time foreclosure proceedings, satisfying and discharging various liens that were on the property, and in taking all other steps that should become necessary in order to make a good title to the property.

Now, in this case, the services rendered by the plaintiff were very slight, and consisted, as we have already seen, in a few short interviews with Mr. Thorndyke and Mr. Coolidge.

The plaintiff formulated no terms for the sale of the property, prepared no agreements, was not present at any of the important transactions which occurred during the negotiations, assumed no duty or responsibility in reference to the foreclosure of mortgages, the satisfaction of liens, the transfer of the property, the adjustment of the rights of the various parties and interests or any other of the acts which had to be done before the property could be transferred or the profits earned.

That the plaintiff did not consider himself as conducting the negotiations is shown by the following facts:

First.—By the statement in his letter of May 28th, to be found on page 41 of the record, in which he says: "This talk of mine is of course rambling. I dare say that by this time you have digested a plan or offer which we can lay before Mr. Coolidge, and which will meet all the requirements of the case on both sides."

Second.—In the fact that he acquiesced in the notice contained in the letter of the president of the company on May 28th, addressed to the plaintiff, in which the president of the company says: "So I have to announce that the field of negotiation has evidently been transferred to New York, and to request that until I can see you you will be dumb as an oyster. Refer all inquiries to this office."

Third.—The plaintiff admits in his testimony, which will be found on page 48 of the record, that he told Mr. Coolidge that he had no authority to name a price for the property, but would have to refer the matter to the president of the company at New York.

Fourth.—That he voluntarily arranged with Mr. Coolidge to have an interview between that gentleman and the president of the company. (Page 49, fols. 111 and 112 of record.)

Fifth.—That he did not attend the interview of June 5th between Mr. Coolidge, Mr. Schofield and the president of the defendant.

Sixth.—That at no meetings held at Boston between the president of the company and Mr. Coolidge did the plaintiff take part in the negotiations.

Seventh.—That the plaintiff did not prepare the agreement of June 13th, which will be found on page 15 of the record, or take any part in the meeting at which the same was executed.

The Court will find on page 54 of the record some exhibits that were read in evidence by the plaintiff for the purpose of showing the meaning which the parties attached to the words which we are now considering.

An examination of those exhibits fully sustain the meaning here contended for.

The Court will see that those were cases where the defendant forwarded to the plaintiff certain securities for sale; that he retained those securities in his custody until he had by his own exertion and without any aid from the defendant disposed of the same, and that then, and not until then, did he report the transaction to the defendant.

Fourth Point.

The refusal of the Court to permit the plaintiff to go to the jury upon his count for a *quantum meruit* was correct and must be sustained.

On page 51 of the record it will be seen that the plaintiff, at the conclusion of his testimony, expressly stated that he rested his claim entirely upon the contract. It also appears that when he closed his case he had not even attempted to prove the value of his services, and there was absolutely no testimony from which the jury would have been justified in inferring the value of his services.

The record shows that the services for which the

plaintiff now seeks to recover compensation were rendered by him as a director of the defendant company: the plaintiff throughout his whole testimony admits this; for example, on page 37 of the record will be found his account of his first interview with Mr. Thorndyke; he there says:

"I told him that we had control of the road in our hands."

"Q. Whom did you mean by 'we'?"

"A. The Investment Company. That we had issued and were issuing circulars asking for subscribers to the bonds of the company."

An examination of the charter of the defendant company will show that the services rendered by the plaintiff were such as were imposed by the charter on persons occupying the position of director.

The law does not imply a promise on the part of a corporation to pay its directors for discharging duties imposed upon persons occupying that position.

Citizens Nat. Bank *v.* Elliott, 55 Iowa, 104.
Lafayette, &c., Ry. Co. *v.* Cheeney, 68 Ill., 570.
First Nat. Bank v. Drake, 29 Kans., 311, and cases there cited.
Butts *v.* Wood, 37 N. Y., 317.

Fifth Point.

If the contention of the plaintiff is correct, to wit, that transactions similar to the sale of the property of the Kansas City, Burlington and Santa Fe

Railroad Company are within the terms of his contract with the defendant company, then the Court must hold that the contract in question is not binding upon the company for the following reasons:

First.—At the time the contract under consideration was signed the plaintiff had no official connection with the defendant company; but it was expressly provided therein that he should *forthwith* be elected one of its directors and appointed its assistant vice-president, and this was done before the contract became or could by its terms become operative.

By the express terms of the contract, the plaintiff was to be invested with the duty of superintending and directing the affairs of the defendant company, as one of its directors and its assistant vice-president, and was to have that relation to the company and its stockholders while he was performing his part of the contract.

It follows, therefore, that in considering the rights of the parties to this litigation, the Court must deal with the contract as if it had been actually made, while the plaintiff was a director of the defendant company.

Gilman, &c., R. R. Co. *v.* Kelly, 77 Ill., 426.
Thomas *v.* Brownsville, &c., R. R. Co., 1 McCreery, 392.
Wardell *v.* R. Co., 4 Dillon, 330.
R. R. Co. *v.* Poor, 59 Me., 270.

Second.—The directors of a corporation, though not technically trustees, stand in a fiduciary relation to the corporation, and are subject to the obligations and disabilities incidental to that relation;

practically the directors are trustees and the stockholders *cestuis que trust.*

Wardell *v.* Railroad Co., 103 U. S. Rep. (13 Otto), 651.
Cumberland Coal and Iron Co. *v.* Sherman, 30 Barb. (N. Y.), 553.
Verplank *v.* Merc. Ins. Co., 1 Edw. Ch., 84.
The York, &c., R. Co. *v.* Hudson, 16 Beav., 485.
Aberdeen R. Co. *v.* Blaikie, 1 McQueen's R., 461.
Hoyle *v.* Plattsburgh, &c., R. R. Co., 54 New York, 314–328.

Third.—And owing to the fiduciary relations existing between a corporation and its directors, it follows that even if a contract between a corporation and one of its directors is fair and reasonable in all its provisions, yet the corporation has an unqualified right to repudiate the same at any time.

Gilman, &c., Railway Co. *v.* Kelly, 77 Ill., 426, and cases there cited.
Thomas *v.* Brownsville, &c., R. R. Co., 1 McCreery, Ct., 392.
Pearson *v.* Concord R. R. Co., 13 Am. and Eng. R. R. Cases, 102, and cases there cited.
Wardell *v.* Railroad Co., 103 U. S. (13 Otto), 651.
Michoud *v.* Girod, 4 How., 503–557.
Aberdeen Railway Co. *v.* Blackie, 1 McQueen's Rep., 461.
Cumberland Coal Co. *v.* Sherman, 30 Barb. (N. Y.) Rep., 568.
Cook *v.* Sherman, 20 Fed. R., 168.
Twin Lick Oil Co. *v.* Marbury, 91 U. S.,587.
Stewart *v.* Lehigh Val. R. R. Co., 38 N. J. L., 505.

Fourth.—It is well settled that a director cannot, by any arrangement, secure to himself a share in the profits of any transaction to which the company is a party.

Gilman, &c., Railroad Co. *v.* Kelly, 77 Ill., 426, and cases there cited.
Koehler *v.* Black River Falls Iron Co., 2 Black, 715.
Cook *v.* Sherman, 20 Fed. Rep., 167.
Wardell *v.* Union Pacific R. R. Co., 103 U. S., 651-658.
Thomas, Trustee, &c., *v.* Brownsville, &c., Railway Co., 1 McCreery, 392.
Pearson *v.* Concord R. R. Co., 13 Am. and Eng. R. R. Cases, and cases there cited.
The Great, &c., Railway Co. *v.* Magney, 25 Beav., 592.
York, &c., Railway Co. *v.* Hudson, 16 Beav., 485.

We have made a careful examination of all the authorities bearing upon this subject; and we find that the courts have uniformly held that the relations of a director or trustee to the corporation and its shareholders is such as to effectually preclude him from deriving any profit from the business of the corporation except such as he receives in common with all its other shareholders.

Fifth.—An examination of the contract will show that it is unreasonable and unjust, and places the private interests of the plaintiff in conflict with the interests of the defendant company and its other shareholders.

It gives the plaintiff very substantial advantages without requiring him to make a reasonable return for the same.

It gives him *one-third* of the *gross profits* of the business, thus making no provision for the debts or other liabilities of the company or the expenses of conducting its business.

It makes no provision for cases where the *gross profits* might be large, but the net profits might be small, or there might be no net profits, or the transaction might result in a loss to the company.

While conducting the business of the company as its agent, it made it for the interest of the plaintiff to throw all the labor and expense of consummating a transaction on the defendant company, thus increasing the *gross* profits, but impairing if not entirely destroying the net results to the company.

In the transaction now before the Court it would give the plaintiff a large sum of money as compensation for exceedingly slight services, and that, too, after he had already received in the form of dividends on his stock a portion of the very money which he now asks judgment for.

Sixth Point.

The judgment of the Circuit Court should be affirmed.

HUGH PORTER,
Defendant's Counsel,
11 Pine street,
New York City.

136.

A. B. HUTCHINS.

HYDRO-CARBON STOVE.

No. 177,334. Patented May 16, 1876.

No. 351
Sharp
vs
Riessner et al
} p 736.

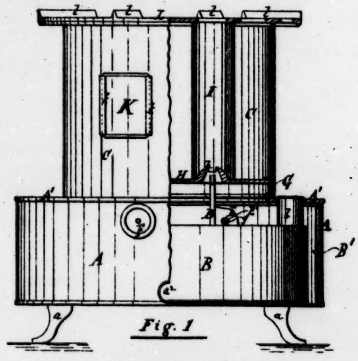


Fig. 1

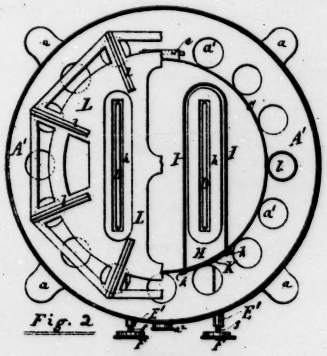


Fig. 2

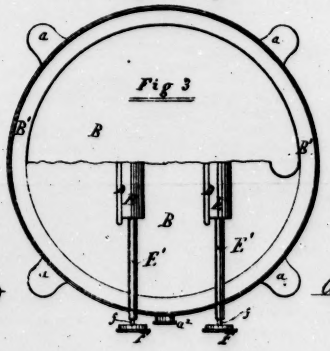


Fig 3

Witnesses
J. R. Easton
M. Van Sickle

Inventor
Abner B. Hutchins

A. B. HUTCHINS.

HYDRO-CARBON STOVE.

No. 177,334. Patented May 16, 1876.

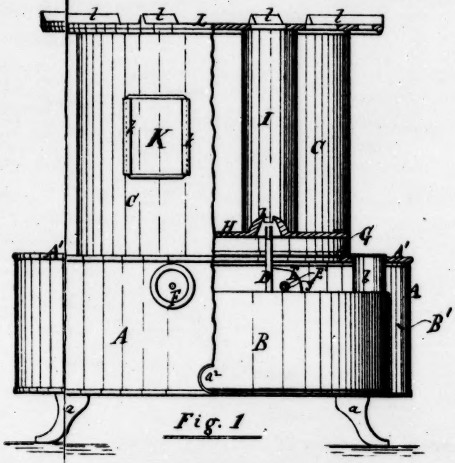


Fig. 1

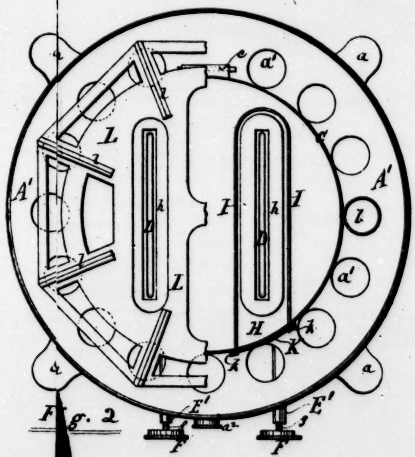


Fig. 2

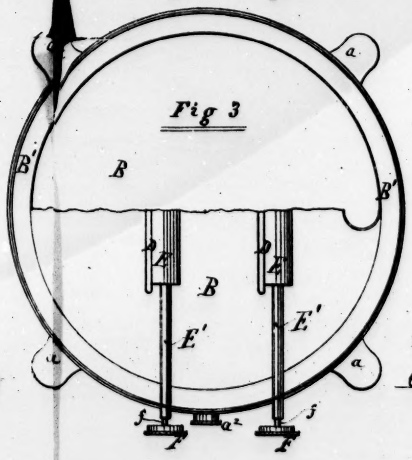


Fig 3

Witnesses

J. R. Cottrell

M. Manitoff

Inventor

Abner B. Hutchins

N. PETERS, PHOTO-LITHOGRAPHER, WASHINGTON, D. C.

2

UNITED STATES PATENT OFFICE.

ABNER B. HUTCHINS, OF BROOKLYN, NEW YORK.

IMPROVEMENT IN HYDROCARBON-STOVES.

Specification forming part of Letters Patent No. **177,334**, dated May 16, 1876; application filed October 4, 1875.

To all whom it may concern:

Be it known that I, ABNER B. HUTCHINS, of the city of Brooklyn, in the county of Kings and State of New York, have invented a new and useful Improvement in Hydrocarbon-Stoves; and I do hereby delare the following to be the specification of the same.

The object of this invention is to produce a stove which can safely and easily be heated by the combustion of a hydrocarbon or oil in a similar manner to that in common use in illuminating-lamps.

The invention consists of the following devices: The vessel or chamber containing the oil or hydrocarbon is submerged in water, so as to always keep the said oil vessel or chamber cool, and thereby free from explosive or other accident. The water-vessel is covered with a perforated metal plate, which forms the base of the hot-air cylinder, on the top of which the culinary or other vessels to be heated are placed. Vertical tubes or flues are placed in the hot-air cylinder in such positions as to act as chimneys for the burners. Mica windows are placed in the sides of these flues or chimneys in such positions as to enable the operator to observe the flame of the burner and to regulate the same as circumstances may require.

The invention will be readily understood by [illegible] the accompanying drawings, of

Figure 1 is partly an elevation and partly a vertical section of the improved stove. Fig. 2 is partly a plan and partly a section of the same. In this view the half of the top plate only is removed, so as to disclose the construction of the hot-air cylinder and the flues or chimneys. Fig. 3 is a sectional plan of the stove, taken just below the top plate of the water-chamber, and showing a part of the top plate of the oil vessel or reservoir broken out.

The base of the stove consists of a vessel, A, resting, for convenience, on short legs *a*. This vessel is intended to contain water, and has a top plate, A′, which is preferably made of cast metal, and strong enough to support all the parts of the stove which are above it. This plate A′ is annular in form if the stove is of general cylindrical construction, (which is preferable to other forms,) the central opening in the said plate being nearly equal in area to the sectional area of the hot-air cylinder C, which rests upon it. Concentrically arranged around this central opening is a series of perforations, a^1, through which atmospheric air passes down into the top part of the vessel A, and thence up through the hot-air cylinder and its chimneys.

The reservoir or vessel B, in which the oil or hydrocarbon is put for use in this stove, is placed within the vessel A, and the bottom of the vessel A may likewise constitute the support for the bottom of the vessel B, and there will be an intervening chamber, B′, between the sides of the vessel B and its inclosing-vessel A, and the sides of the vessel A will extend up one or two inches (more or less) above the top of the vessel B. While in use the annular chamber B′ will be filled with water, and water will also cover the top of the vessel B, which said vessel and its contained fluid will thereby be always kept at a low temperature, and accident from the ignition or explosion of the oil or hydrocarbon will thus be rendered impossible by this water covering. A tube, *b*, extends from the vessel B up through one of the perforations or apertures a^1, and serves as a means of filling the vessel B. A suitable screw-cap closes the top end of this tube. A pipe or valve, a^2, leads from the chamber B′ to the outside of A, for the purpose of drawing off the water when it becomes heated, or when the occasion requires it. Water may easily be poured into the vessel A through the apertures a^1.

The wick-tubes D are attached to the top of the vessel B, and the wick used to conduct the oil from B to the flame is operated in the usual manner of illuminating-lamps. The rollers for moving the wicks up and down are inclosed in casings or housings E, and are operated by the thumb-wheels F, the stems *f* of which pass through tubes E′, that are attached tightly to the ends of the housings E, and pass through the side of the vessel A. Care must be taken to have all of the parts of D E E′ that lie within the water-way of A perfectly water-tight, so as to prevent the leakage of the water either into the vessel B or outside of A.

The hot-air cylinder C is preferably built of sheet metal, and is hinged to its base-plate A′

by the hinge *c* at the back side of the stove, so as to permit the top parts of the stove to be tipped back out of the way of trimming the wicks, or for other purposes. A finely-perforated diaphragm, G, covers the central opening of the base-plate A′ below the hot air cylinder, for the purpose of properly controlling the air-currents that pass up from the chamber of A into the hot-air cylinder. A diaphragm, H, within the hot-air cylinder C, and near its base, is fixed, by riveting or otherwise, to the sides of the said cylinder. Portions of this diaphragm are formed into conical flame-caps *h*, for controlling and confining the flame within its proper limits in a manner similar to that in common use in illuminating-lamps.

Above the diaphragms H tubes or chimneys I confine the hot gases and products of combustion from the flames of the burners within proper limits for the efficient action of the burners. These tubes or chimneys I extend from the diaphragm H to the top of the hot-air cylinder, and are preferably made of sheet metal. The shell of the hot-air cylinder C forms one side of each of these chimneys, and in this side, which is common to both the cylinder and the chimney, a small mica window, K, is placed, so as to enable the operator, from without, to see and regulate the flame of the burners by turning the thumb-wheel F, as required. For simplicity of construction I cut apertures in the side of the hot-air cylinder, suitable for the windows K, and through these apertures portions of the metal of the chimney-plates are extended, which said portions are bent over in the form of grooves *k*, as in Figs. 1 and 2, for the reception of the mica plates that are to form the windows.

The top of the hot-air cylinder is covered with a cast-metal plate, L, that serves as a rest for whatever vessel is to be heated on this stove. The plate L is perforated with apertures over the chimneys, and also over the hot-wells of the cylinder C, as well as in the portions lying outside of the cylinder, thus permitting all of the heat generated to reach the vessel on top of the plate L, and thereby be utilized. The intense heat imparted to the plates of the chimneys I and plate L, and reflected thence back upon the hot gases passing through and about these parts, will be quite sufficient to consume all of the smoke, and there will, in consequence, be no emission of unpleasant odors from imperfect combustion. The top surface of the plate L is provided with ridges *l*, that keep the vessels placed thereon from obstructing the openings in the said plate.

Having described my invention, I claim—

1. The water-vessel A, with its perforated top plate A′ and hot-air cylinder C, hinged at *c* to plate A′, and top perforated plate L, all arranged and connected together substantially as and for the purpose set forth.

2. The chimneys I, having one of their sides formed by the hot-air cylinder C, to which they are connected by the groove-clips *k*, that also receive the mica windows K, as and for the purpose set forth.

ABNER B. HUTCHINS.

Witnesses:
J. H. COLTON,
M. RANDOLPH.

118,358

UNITED STATES PATENT OFFICE.

JOHN A. FREY, OF WASHINGTON, DISTRICT OF COLUMBIA, ASSIGNOR TO HIMSELF, S. A. H. MARKS, AND JOHN F. WALKER.

IMPROVEMENT IN COAL-OIL STOVES.

Specification forming part of Letters Patent No. 118,358, dated August 22, 1871.

To all whom it may concern:

Be it known that I, JOHN A. FREY, of the city of Washington, in the District of Columbia, have invented certain Improvements on Coal-Oil Stoves, of which the following is a specification:

My invention relates to that class of stoves specially adapted to burning natural coal-oil or any of its derivatives as the fuel, and is intended to be used as a portable stove, it being so constructed and arranged as to require but a small space whereon to place it, and is in every respect a safe, convenient, and economical stove.

The drawing accompanying this specification represents my invention, and shows, by Figure 1, a front view of the stove; Fig. 2 being a view, by section, on the dotted line of Fig. 1; Fig. 3 being a top view of the heating portion of the stove detached from the other part; and Fig. 4 being a view, by vertical section, of the heating parts of the stove with the chimney turned off or removed.

The different parts are indicated by the following letters: *a* indicates the oil-chamber; *b*, a water-chamber; *c*, the filling-tube to the oil-chamber; *d*, the tube to the water-chamber; *e*, the cement-chamber; *f*, the wick-tubes; *g*, a water-tube or space; *h*, an air-space between the upper plate of the cement-chamber and a perforated plate, *i*; *j*, the chimney, with the cones *k* and *l*; and *m*, that part of the stove having pot-holes *n* and a flue, *o*, with a seat, *p*, for a heater or plate-warmer. Several parts or pieces of this stove may be made of cast metal, as, for instance, the part *m*, which may be cast as one piece; but the whole can be made of sheet metal. The part *m* can readily be detached from the lamp or heating part with the chimney *j*, as the chimney will fit into the hole of the bottom plate of the part *m* as a pipe fits into a socket. This will allow of the separating of the parts for the more convenient packing or carrying of them, and for filling or lighting of the lamp. The construction and arrangement of the lamp or heating part insure perfect safety in the use of the liquid fuels, as the cement-chamber and water-chamber between the flame and the oil-chamber entirely prevent any communication of heat to the oil-chamber. The wick-elevators *q*, it will be noticed, are surrounded by the cement, thus preventing any escape of vapor from the fluid in the fuel-chamber along the track of the elevators, and aiding to keep the wick-tubes cool. In the water-space *g* a wick will be placed so as to conduct water from the water-chamber up to the side of the wick-tubes, and thus aid in cooling the base of the wick-tubes. These tubes are, therefore, fully protected by the cement and water. The arrangement of the cones *k* and *l* with the disseminator *r* gives the proper direction to the flame and heat, and prevents the heating up of the chimney *j*, which would be apt to occur if the cones *k* were used without *l*, or if *l* were short and had not the directing-plate *r*. While the perforated plate *i* allows the air to pass up from the air-space *h*, it also serves to prevent the passage of the flame downward and toward the oil-chamber.

What I claim as my invention is—

1. The cement-chamber *e*, inclosing the wick-elevators, in combination with the water-chamber *b* and fuel-chamber *a*, when arranged in relation to the wick-tubes and perforated plate *i*, as herein recited.

2. The arrangement of the cones *k* and *l*, having the disseminator *r*, and surrounded by the chimney *j*, as set forth.

3. The combination of the oil, water, and cement-chambers, and the cones *k* and *l*, disseminator *r*, chimney *j*, and perforated plate *i* with the part *m*, as described.

This specification signed this 11th day of July, 1871.

JOHN A. FREY.

Witnesses:

THOS. T. EVERETT,

ROBERT EVERETT.

39

JOHN A. FREY. 2 Sheets--Sheet 1.

Improvement in Coal Oil Stoves.

No. 118,358. Patented Aug. 22, 1871.

Fig: 1

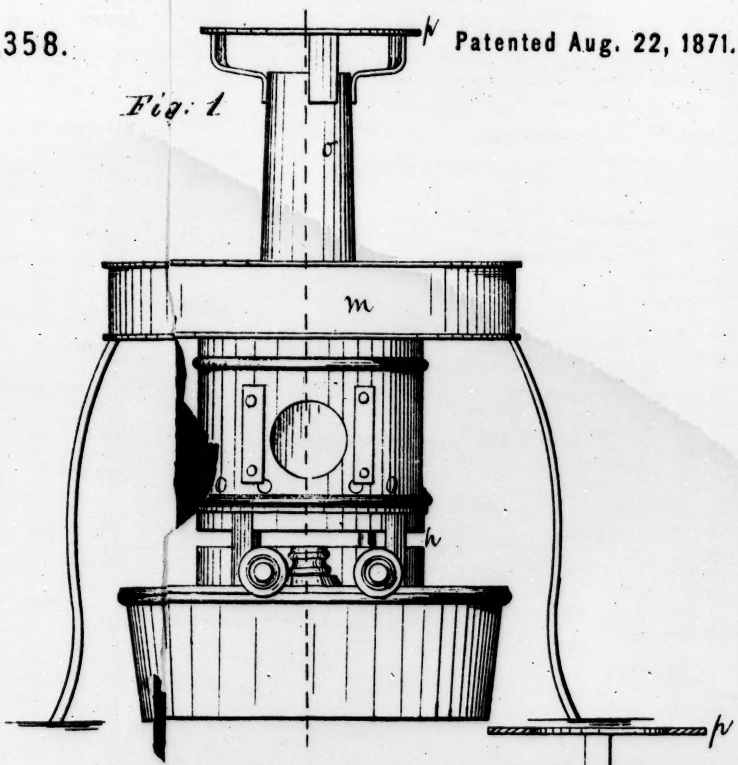
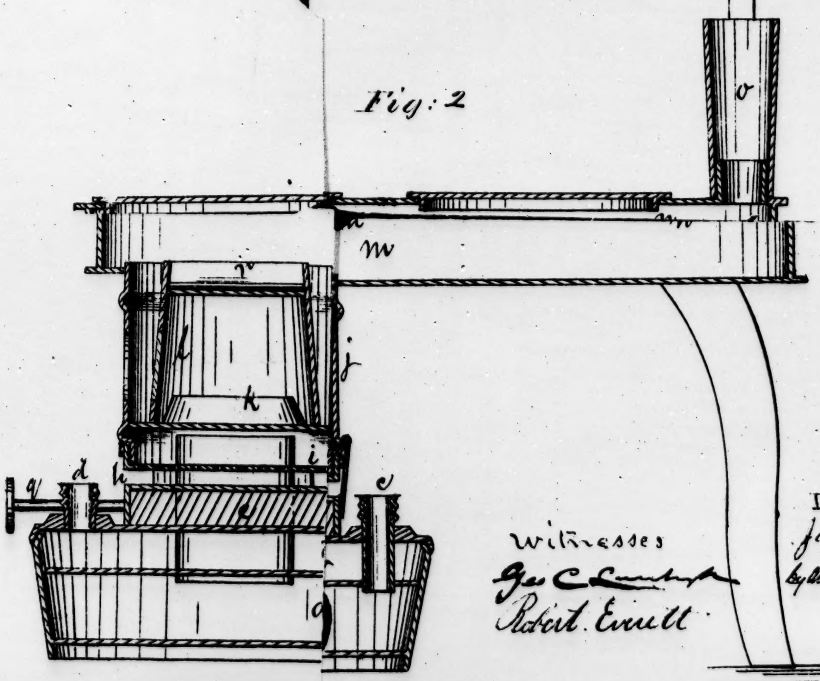


Fig: 2



Witnesses
Geo C. Lambdin
Robert Ennell

Inventor
John A. Frey
by Att'y R. J. Ennell

CO. N.Y. (OSBORNE'S PROCESS)

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JOHN A. FREY. 2 Sheets--Sheet 2.

Improvement in Coal Oil Stoves.

No. 118,358. Patented Aug. 22, 1871.

Fig: 3

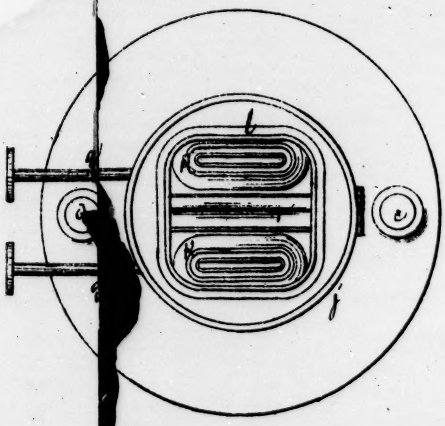
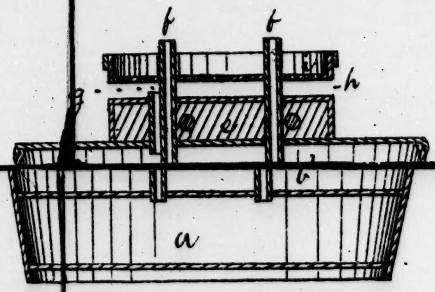


Fig: 4



Witnesses
Geo C Lambright
Robert Everett

Inventor
John A. Frey
by Atty Rob. T. Everett

United States Patent Office.

JOHN BOWLES, OF AUGUSTA, GEORGIA, ASSIGNOR TO HIMSELF AND SAMUEL BARD, OF SAME PLACE.

Letters Patent No. 111,512, dated February 7, 1871.

IMPROVEMENT IN LAMPS FOR COAL-OIL STOVES.

The Schedule referred to in these Letters Patent and making part of the same.

I, JOHN BOWLES, of Augusta, in the county of Richmond and State of Georgia, have invented certain Improvements in Lamps for Coal-oil Stoves, of which the following is a specification.

Nature and Objects of the Invention.

The first part of my invention relates to an improvement in the form of the water-pan to be interposed between the oil-reservoir and the burners of a coal-oil lamp, and consists in the formation of recesses on the under side thereof, to embrace and cover the toothed or ratchet-wheels and rods on either side of the wick-tubes, serving to operate the wicks therein; the object of this part of my invention being to provide a water-pan which shall rest closely and accurately upon a lamp or oil-reservoir, whose wick-ratchets are arranged immediately upon the top thereof, and to obtain thereby more compactness in the structure of the complete lamp.

The second part of my invention relates to the combination of jackets of cloth or other absorbent material with the exterior surfaces of the projections in the water-pan made to embrace the wick-tubes of the lamp; the object of this part of my invention being to keep said wick-tubes cool by cooling the inclosing casing with a constant supply of moisture.

The third part of my invention relates to the use of one or more vertical partitions placed in the wick-tubes, transversely or parallel with the ends thereof, to divide the same longitudinally into separate tubes, so closely approximating, however, as that the ends of the wicks placed therein, although separated, shall very nearly touch, and will produce an unbroken flame from end to end of the wick-tube; the object of this part of my invention being to overcome the difficulties in obtaining a uniform elevation and depression of the extremely wide wicks required in lamps for coal-oil stoves, by dividing the same into sections, so that while each may be moved independently with as much ease and regularity as a simple narrow wick, their simultaneous movement and close approximation will produce the effect of an unbroken wick equal in width to their combined widths.

The fourth part of my invention relates to an improved form of wick-arrester, consisting of a bent spring or pawl placed exactly opposite each ratchet-wheel operating the wick, but on the side of the wick-tube opposite thereto, so that the upper end of the spring shall bear through a slot in the wick-tube against the wick therein, or, if the upper end of the wick drops down below the same, shall spring across the tube and engage the teeth of the ratchet, so as to prevent its further revolution before the wick has fallen entirely below the reach of the ratchet-teeth; and in the combination with said spring of a cam on a horizontal rod, whereby the spring may be thrown and fastened back when it is desired to relieve the wick from its operation. The object of this part of my invention is to prevent, by an automatic device, the accidental forcing back of the wick into the oil-reservoir, from which it could not be removed without difficulty.

Description of the Accompanying Drawing.

Figure 1 is a front elevation of my improved coal-oil lamp and heating apparatus.

Figure 2, a vertical section thereof transversely to the wick-tubes, in line *x x* of fig. 4.

Figure 3, a top view of the water-pan covering the oil-reservoir.

Figure 4, a top view of the oil-reservoir, with the water-pan removed.

Figure 5, enlarged sectional views of the wick-tubes and their ratchet-wheels, illustrating the combination of the arresting springs therewith.

General Description.

A is the oil-reservoir, of the wide, flat, and shallow form usually adopted for use with coal-oil stoves.

B B, two parallel wick-tubes projecting from the top thereof, and securely fastened thereto with tight joints. These wick-tubes are extremely wide, as illustrated in fig. 4, to produce wide-extended flames, but they are divided each into two sections by a thin central transverse partition, *c*, fig. 4, so that each wick is necessarily divided longitudinally in extending across the tube from end to end, or, rather, each tube is filled by two wicks, each fitting one of the sections, as illustrated in said fig. 4.

D is an opening in the top of the reservoir through which it is filled with oil. This opening is fitted with a nozzle covered by a cap, D', and is provided with a float-rod, *d*, [illegible] therein to indicate automatically the height of the oil in the vessel.

E E are ratchet-wheels, or toothed wheels formed and fitted as usual to the wick-tubes upon horizontal rods or shafts extending to the outer edge of the vessel, and terminating in thumb-screws *e e*, as shown in fig. 4. Two of said ratchet-wheels are provided for each division of the wicks, as illustrated in said fig. 4.

Opposite a ratchet-wheel of each wick, and on the opposite side of the wick-tube therefrom, is secured a spring, F, (see fig. 5,) whose upper free end is bent inward so as to pass through a slot in the wick-tube, and, when no wick intervenes, engage with the teeth of the opposite ratchet-wheel, so as to prevent a revolution thereof. When the wick intervenes the spring bears thereon, but with such moderate pressure as not to impede its movement. Hence when the wick is above the ratchet-wheel the latter is free to move in either direction to elevate or depress the wick, but so soon as the wick drops below the upper tooth of

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the wheel, then projecting into the tube so as to expose it, the spring flies in over the wick, and, by engaging said tooth, prevents a further revolution of the wheel, and thus prevents the wick from being turned down entirely out of its reach, as clearly illustrated in fig. 5 of the drawing.

In order to retract the springs or pawls F F cams *g g* (see fig. 5) are placed under each of them, upon rods G G (see fig. 4) extending, parallel to the rods carrying the ratchet-wheels, out to the front of the lamp. The front ends of these cam rods G G are bent, (see fig. 4,) to facilitate the partial revolution thereof required in order to cause the cams *g g* to bear outwardly upon the springs F F and retract them from the toothed wheels E E and from pressure upon the wicks.

H is the water-pan of my improved stove-lamp. It is formed with separate arched recesses in its under side, terminating upwardly in extended flat tubes, said recesses and tubes being made to fit over, embrace, and cover the toothed wheels, springs, and wick-tubes projecting from the top of the oil-reservoir A, as illustrated in the sectional fig. 2, and also in fig. 3.

The two arched recesses communicate with a flat recess, *r*, (see top view thereof in fig. 3,) extending to the outer edge of the vessel, through or under which the ends of the ratchet and cam-rods extend to the front when the water-pan is placed upon the oil-reservoir. The front portion of the pan is cut out with a semicircular notch, (see fig. 3,) to embrace the nozzle D of the oil-reservoir.

Upon the upper side of the projecting arches in the water-pan forming the arched recesses on the under side thereof, covering the ratchet-wheels of the wick-tubes, and about the flat tubes projecting from the arches to embrace said wick-tubes, I place close-fitting jackets K K, of felt, cotton cloth, or other absorbent material, to extend from the bottom of the pan to near the upper edge of the tubes, so as to keep said tubes constantly wet, and consequently cool, when the lamp is burning.

Over this water-pan and the burners projecting therefrom, I support, upon legs L L, an annular plate, M, upon which is placed a drum, completing the apparatus for cooking and heating purposes. This drum consists of a bottom plate, O, provided with extended "cones" P P of ordinary form, to fit over the upper ends of the wick-tubes and supply air to the flame, and with metallic chimneys R R, which are secured at their lower ends to the bottom plate O, so as to embrace the cones P P, ~~and at the~~ [illegible] ends to a top plate, S, through which they project slightly, as shown in fig. 1; and it is completed by an outer perforated plate, N', secured to the rims of the top and bottom plates S O, and inclosing the chimneys R R with an open chamber, as illustrated in fig. 2.

Openings T T, fig. 1, are provided for lighting the wicks and viewing the flames, said openings being closed by means of a sliding door, W, provided with mica windows corresponding thereto.

The ovens and other cooking-utensils to be used with this stove are supported over the top plate S, or combined therewith in the usual manner.

I am aware that two or more wicks have been used in a divided wick-tube in ordinary lamps for the purpose of increasing the light, but my improvements in wick-tubes are confined to lamps used for heating purposes, where the wicks are so placed in relation to each other as that there is but one breadth of wick in a horizontal line.

Claims.

I claim as my invention—

1. Arched recesses formed as herein described upon the under side of the water-pan H, and terminating in extended tubes projecting upwardly from the arches on the upper side thereof, for the purpose of covering and embracing the wick-tubes of the lamp and the toothed wheels and rods operating its wicks, and to permit the water-pan to rest immediately upon the lamp, the whole being arranged and combined substantially as herein set forth.

2. The combination of jackets K K of absorbent material with the outer surface of the arches and tubes projecting from the bottom of the water-pan, to cover the same, substantially in the manner and for the purpose herein set forth.

3. One or more vertical transverse partition-plates, c, secured in the wick-tubes of a lamp for coal-oil stoves parallel to the ends of said tubes, so as to divide the wide wicks usually employed therein into two or more sections, substantially in the manner and for the purpose herein set forth.

4. A spring or pawl, F, so combined with the wick-tube of an oil-lamp as to engage the teeth of the ratchet-wheel operating the wick therein, when the wick is not interposed between them, all substantially as and for the purpose herein set forth.

5. The combination of a cam, *g*, with the spring F, engaging the ratchet-wheel of the wick-tube of a lamp, and with an operating-rod, G, all substantially as and for the purpose herein set forth.

Witness my hand to this specification.

JOHN BOWLES.

Witnesses:

DAVID A. BURR,

H. H. YOUNG.

9

J. BOWLES.

LAMP FOR COAL OIL STOVES.

No. 111,512. Patented Feb. 7, 1871.

FIG: 1.

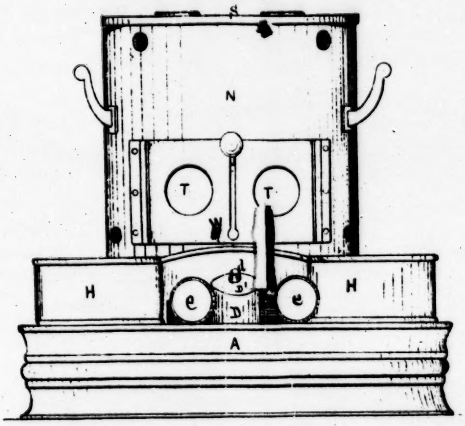
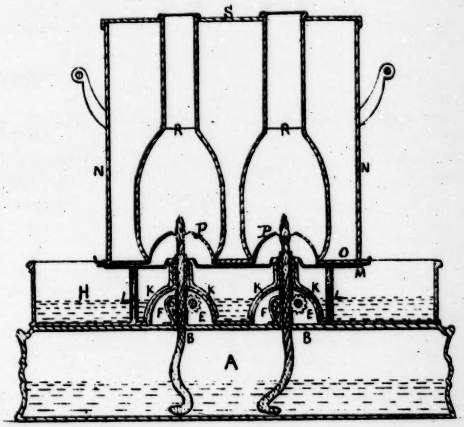


FIG: 2.



John Bowles
Inventor
By David A Burr
atty:

FIG: 3.

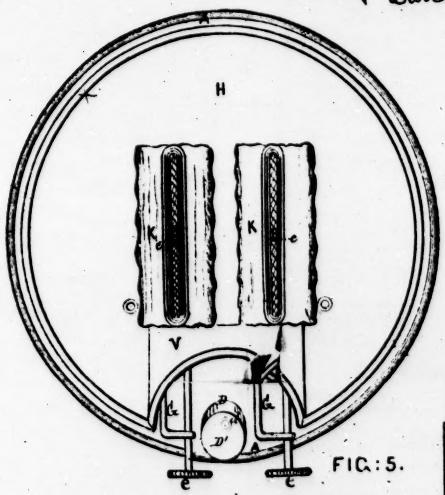


FIG: 4.

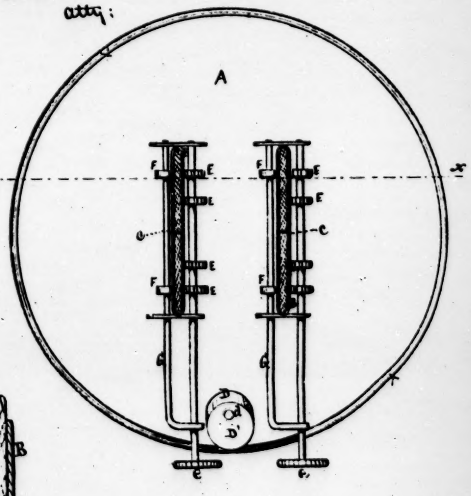
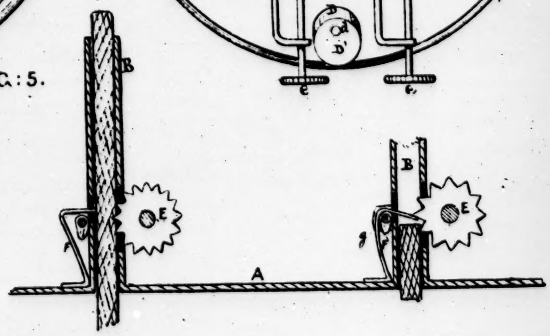


FIG: 5.



Witnesses
H. H. Young
Joseph Ward.

N. PETERS. Photo-Lithographer, Washington, D. C.

10

UNITED STATES PATENT OFFICE.

ROBERT B. MITCHELL, OF CHICAGO, ILLINOIS.

KEROSENE-STOVE.

Specification forming part of Letters Patent No. **96,249**, dated October 26, 1869.

To all whom it may concern:

Be it known that I, ROBERT B. MITCHELL, of Chicago, in the county of Cook and State of Illinois, have invented a new and useful Improvement in Kerosene-Stoves; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings and the letters and figures marked thereon, which form a part of this specification, and in which—

Figure 1 represents a side elevation of my improved stove; Fig. 2, a vertical sectional view at the line *x*, and Fig. 3 a transverse sectional view at the line *y*, it being made upon a smaller scale than the other views.

The nature of my invention consists in the combination of the chimney and the plates in a kerosene-stove, as hereinafter more fully described. It further consists in the projectures or points on the surface of the plate on the top of the chimney, so arranged as to admit cooking-furniture being placed upon them, but not upon the top of the chimney; and it also further consists of the combination of the rings that hold the cooking-furniture on the top of the stove, as hereinafter more fully specified.

To enable those skilled in the art to understand how to manufacture and use my invention, I will proceed to describe the same with particularity.

The same letters of reference refer to the corresponding parts in the different figures.

In the annexed drawings I have represented the kerosene-oil pot A resting in a cast-iron bottom, B; and C are the ordinary wick-tubes. There is a plate, D, cast with openings or holes for the wick-tube and cone of the burner, and it has a rim or flange, E, which extends down from its circumference nearly or quite half the length of the wick-tube, and there is a perforated diaphragm, F, attached to the lower edge of this flange, through which the air passes to reach the burner. There are holes in this perforated diaphragm, through which the wick-tubes pass, and there is an air-space between the diaphragm and the plate D. The rim or flange E is of thick heavy metal upon bearings H, and supports the stove above, said bearings resting on the oil-pot A.

I are the cones, and they have flanges near their bases, as shown, to hold them in position on the plate D. The chimneys J are placed over the cones I, resting on the plate D, and when they are made separate from the cones there is a recess or notch in the bottom of the cone, as shown, for the flange of the cone, so that the chimney rests partly on the flange and holds the cone in place. The cone and chimney may be cast together, there then simply being a flange on the bottom of the cone to pass through the plate D around the burner C. There rests on the top of the chimneys a plate, K, there being holes in said plate for the tops of the chimneys, as shown, and notches in the tops of the chimneys to receive the plate, to prevent it from sliding laterally. The plates K and D are firmly bolted together by the screw-bolt L, the chimneys and cones being securely fastened between them, as shown. There are projections or ribs O on the upper surface of the plate K, for the purpose of preventing the placing of any cooking utensil directly on the top of the chimneys, thereby stopping the draft, and at the same time said projections are sufficiently high and so arranged that by placing a cooking utensil upon them it is placed so near the heat passing through the chimneys that it is quickly heated without interrupting the draft of the chimneys. The plate K has also a vertical rim or flange, P, with projections R upon its upper edge to receive the cooking utensil. These projections are to secure a freedom of draft through the chimneys by securing an open space beneath the cooking utensil placed upon the stove to be heated.

It is frequently desirable to use in cooking utensils of different sizes. As most articles of stove-furniture are made either nine or seven inches in diameter, I usually make the projections R on the top of the flange P so as to receive nine-inch furniture, and I also make an additional ring or rim, S, which fits upon the top of the ring or flange P, and has its top drawn in, making a smaller circumference, so that its projections T upon its upper edge receive smaller cooking utensils, ordinarily seven-inch utensils. This ring S can be readily removed and replaced, as desired, as it simply rests upon the ring P.

I am aware that kerosene cooking-stoves have been made in which, instead of the chimneys that I use, a single cylinder is used to make the draft for all the burners, in which

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stoves, the draft being imperfect, the burners are very liable to smoke, and the heat is not as great in proportion to the oil consumed.

Having fully explained the construction and operation of my improved kerosene-stove, what I claim, and desire to secure by Letters Patent, is—

1. The combination of the chimneys J and plates D and K, when constructed and arranged in a kerosene-stove substantially as and for the purposes specified and shown.

2. The projections or ribs O on the upper surface of the plate K, in combination with the chimneys J in a kerosene-stove, when constructed and arranged substantially as and for the purposes described.

3. The ring S, in combination with the rim or ring P, when constructed and operating substantially as and for the purposes set forth.

4. The combination of the plate D, flange E, and perforated plate or diaphragm F, when constructed and arranged substantially as and for the purposes specified and shown.

ROBERT B. MITCHELL.

Witnesses:
LEWIS L. COBURN,
H. BRUNS.

12

31

R. B. MITCHELL.

Lamp Stove.

No. 96,249. Fig. 1 Patented Oct. 26, 1869.

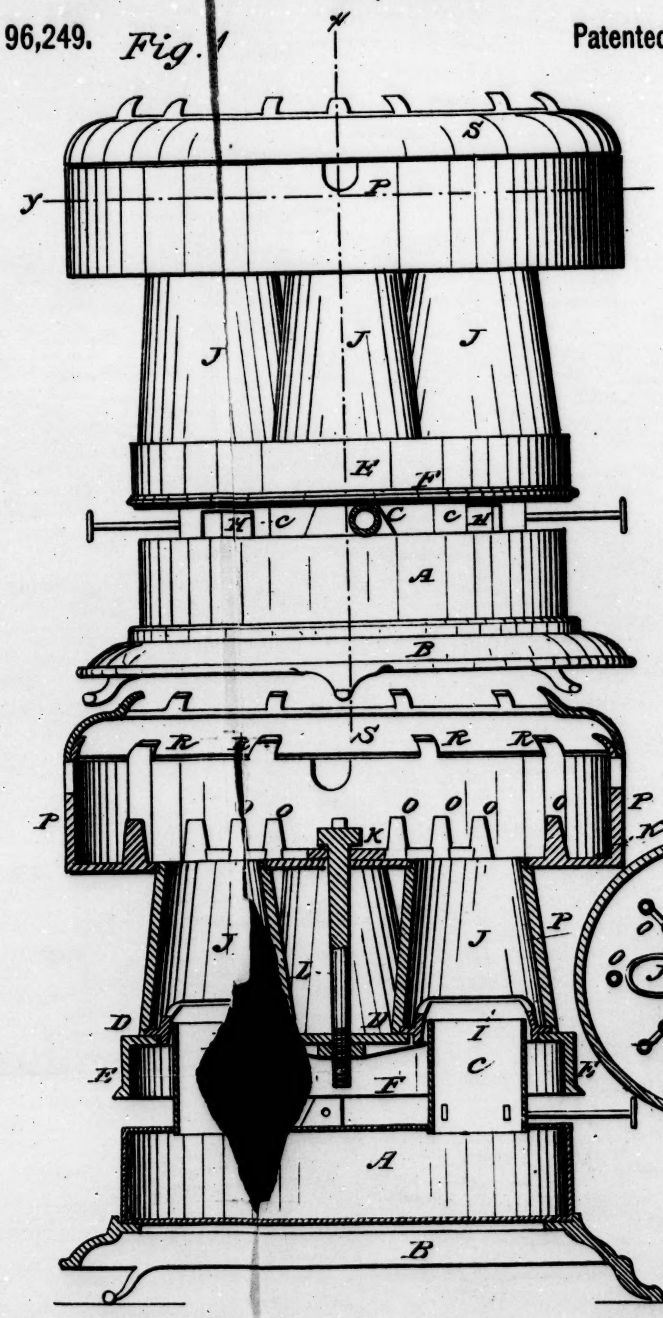
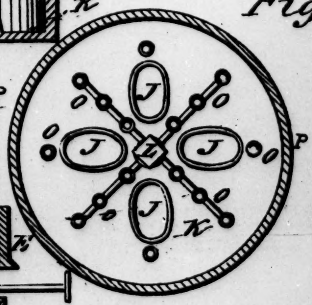


Fig. 2

Fig. 3



Witnesses:

Lewis L. Coburn

Inventor:

Robert B. Mitchell

13

UNITED STATES PATENT OFFICE.

WILLIAM B. BILLINGS, OF BROOKLYN, NEW YORK.

IMPROVEMENT IN COAL-OIL LAMPS FOR COOKING PURPOSES.

Specification forming part of Letters Patent No. **50,892**, dated November 14, 1865; antedated September 11, 1865.

To all whom it may concern:

Be it known that I, WILLIAM B. BILLINGS, of the city of Brooklyn, county of Kings, State of New York, have invented a new Mode of Constructing Oil-Stoves for Cooking and Heating Purposes; and I do hereby declare that the following is a full and exact description of the same.

The nature of my invention consists in a new and improved mode of constructing oil-stoves for heating and cooking purposes.

One object of my present invention is to produce heat from the petroleum and coal oil now in common use without the aid or assistance of a flue or chimney, or any device which shall produce the necessary air for perfect combustion by induction or impulsion; or, in other words, to construct a lamp and burner which shall operate on the same plan or general theory as the "no-chimney" coal-oil burners now in general use.

There are many oil-stoves now in use with flues or chimneys constructed in a great variety of ways, and my Union Oil-Stove, patented January 17, 1865, although it has no attachment of a flue or chimney, yet the body of the stove acts upon the burner in the same manner as the chimney upon the ordinary burner.

It is plain that if a lamp can be constructed to use the no-chimney burner, it will be much more simple and less expensive than by any other mode. But the great difficulty to be overcome is to prevent the oil from becoming heated; for, if the flame be large enough to give the necessary heat for practical purposes, the oil will become much more heated by using the no-chimney than with the common chimney burner, as the cold air drawn in by the flue or chimney can be so adjusted as to keep the heat in a measure from the oil; but this difficulty I overcome by using a water-bath between the flame and the oil.

To enable others skilled in the art to make and use my invention, I will now proceed to describe its construction and mode of operation, reference being had to the accompanying drawings with the letters of reference marked thereon.

The oil pot or vessel may be made of any shape or size desired, but with large opening in the center of the top for the wick to pass. (See drawing A in drawings annexed.) I then construct another vessel for the water-bath with the same or larger top surface as the oil-vessel, but about half the height or thickness as the oil-holder. In this water-bath vessel the wick-tubes are fastened. (See drawing B.) The wick-tube *c*, which is the oil-tube, passes through the water-bath about half an inch, and of course is surrounded with water. On one or both sides of the wick-tube *c* are wick-tubes which only pass into the water-bath. (See letters *d d*.) These tubes hold a wick which carries the water up the sides of the oil-tube *c* to within about half an inch of the top. By cutting slots or notches in the top of the wick-tube *c* about one-fourth of an inch long (see letters *e e e* in drawing B) and trimming the wick even across the top of the notches the flame will feed itself with oil by burning down the slots, and the wick can remain without cutting or trimming for a long time, as the points between the slots or notches will hold the burned and charred wick from falling off or breaking away, thus keeping the surface or top of the wick level and even.

Another way of holding the charred end of the wick in its place is to use wire-gauze over the end of the wick, or raise the wick to the proper height above the top of the wick-tube and put the wire-gauze over the wick and tube together; but for many practical reasons the notches *e e e* are preferable. But neither the notches *e e e* nor the wire-gauze are practical with the ordinary burner, as it would overheat and be unsafe to use; but with the wick-tube passing through my water-bath the difficulty of overheating is entirely overcome.

The cone to be adjusted over the wick-tube *c* is shown in drawing F. This cone may be fastened or adjusted over the wick-tube so as to be movable. The slot in the cone should be about one-fourth of an inch above the top of the wick-tube *c*.

The water-bath B is placed over the oil-holder A and insulated from it by resting on points about one-eighth of an inch high, which may be fastened to the oil-vessel A, (see let-

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ters *g g g* in drawing A,) or a sheet of cork-wood or some other good non-conductor of heat may be put between the oil-holder A and water-bath B. Thus the heat from the flame or flames is kept from the oil-vessel by the water-bath B, and the heat of the water-bath itself from the oil-vessel by insulation.

The opening in the top of the oil-vessel A should be large enough to freely admit the wick or wicks suspended from the wick tube or tubes in the water-bath B, and the water-bath should be so adjusted on the oil-vessel that the wick-tubes will not touch it. The steam or vapor from the wick-tubes *d d* passes into the flame under the cone F, which very materially assists combustion and increases the heating power.

A complete heater, with two burners and with the wick worked by ratchet-wheels in the usual way, is shown in drawing H.

I do not consider it necessary to go into any detailed description of the manner of getting up the different-sized stoves or ranges necessary for common use, as it will readily be seen that all that is further required is simply a frame or support over my oil-heater upon which to rest the vessel or dish for cooking, or a drum for heating.

What I claim as my invention, and desire to secure by Letters Patent, is—

1. The water-bath B, constructed with the no-chimney burner, for cooking and heating purposes, substantially as described and set forth.

2. The insulation of the water-bath B from the oil-vessel A, substantially as described, and for the purposes set forth.

3. The wick-tubes *c* and *d d*, fastened and attached to the water-bath B, the whole being separate from yet adjusted to oil-vessel A, substantially as described, and for the purposes set forth.

4. The slots or notches *e e e* in the wick-tube *c*, or their equivalent, when used with the side water-wicks, *d d*, and water-bath B, arranged and constructed substantially as described and set forth.

W. B. BILLINGS.

Witnesses:
BARRY FOX,
CHAS. D. EVANS.

15

45

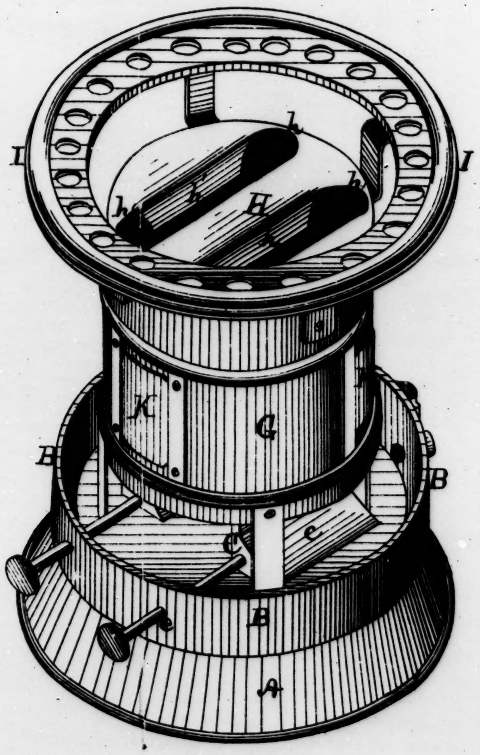
3 Sheets--Sheet 1.

J. A. FREY.

Coal-Oil Stoves.

No. 156,149. Patented Oct. 20, 1874.

Fig. 1.



WITNESSES:

Jas. E. Hutchinson

John R. Young

INVENTOR.

John A. Frey, by

Brindle and Beane, his Attys

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UNITED STATES PATENT OFFICE.

JOHN A. FREY, OF WASHINGTON, DISTRICT OF COLUMBIA.

IMPROVEMENT IN COAL-OIL STOVES.

Specification forming part of Letters Patent No. **156,149**, dated October 20, 1874; application filed July 8, 1874.

To all whom it may concern:

Be it known that I, JOHN A. FREY, of Washington, in the county of Washington and in the District of Columbia, have invented certain new and useful Improvements in Coal Oil Stoves; and do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings making a part of this specification, in which—

Figure 1 is a perspective view of my stove as arranged for use. Fig. 2 is a like view of the same with the upper hinged portion turned to one side so as to uncover the wick-tubes, and Fig. 3 is a vertical central section upon a line having a right angle to said tubes.

Letters of like name and kind refer to like parts in each of the figures.

My invention is an improvement upon a similar device which has before been manufactured and sold by me, and which is protected by several patents; and it consists in the peculiar construction of the funnel or chimney, and its combination with the wick-tubes, substantially as and for the purpose hereinafter shown.

In the annexed drawings, A represents the reservoir for containing oil, which reservoir has, preferably, downward and outward flaring sides, and at its upper side and outer edge is inclosed by means of an annular flange, B, that has a height of about one and one-half inch, and is used to contain water for receiving the heat radiated downward from the burners, so as to prevent the same from being communicated to the oil. From the reservoir A two tubes, C and C, extend upward to the required distance, and serve to contain wicks D and D, of usual shape. Said wicks are moved vertically by means of star-wheels E and E, which latter are secured upon, and rotate with, suitable shafts, *e* and *e*. In order that the wick-wheel shafts *e* and *e* may be prevented from becoming warped by the action of the heat, so as thereby to change the relative positions of the wicks and engaging wheel, said parts are located within a suitable housing, *c*, below the water-line, by which means a perfect protection is afforded, and all liability to derangement avoided. Above and around the upper ends of the wick-tubes C and C is placed a cap, F, that is provided with cone-shaped kerbs *f* and *f*, one of which coincides with each of said tubes, and permits the flame of the burning oil to pass upward from the wick. From the cap F, which is, preferably, constructed from cast metal, a sheet-metal cylinder, G, extends upward about seven inches, and at its upper end is inclosed by a metal head, H, which latter is provided with two openings, *h* and *h*, that coincide in position with the wick-tube kerbs *f* and *f*, but have considerably larger horizontal dimensions. From each side of each opening *h* a flange, *h'*, extends downward, and causes the heated escaping gases to be deflected toward the ends of said openings, instead, as would otherwise be the case, of passing outward, principally at the longitudinal center of the same. The cylinder G, cap F, and head H, which form the chimney of the lamp, are hinged so as to permit of being turned to one side, as shown in Fig. 2. An elevated support, I, for cooking utensils, is secured to the upper end of said cylinder, and a number of glazed openings, K and K, are provided in the sides of the latter, completing the apparatus, the operation of which will be readily understood from the foregoing description.

Having thus fully set forth the nature and merits of my invention, what I claim as new is—

The combined cap and chimney, consisting of the cap F, provided with the kerbs *f* and *f*, the sheet-metal cylinder G, and the head H, provided with the openings *h* and *h*, and flanges or flue-plates *h'* and *h'*, depending from the sides only of said openings, said parts being constructed and combined to operate in the manner and for the purpose substantially as shown.

In testimony that I claim the foregoing I have hereunto set my hand this 26th day of June, 1874.

JOHN A. FREY.

Witnesses:
GEO. S. PRINDLE,
WILLIAM FITCH.

17

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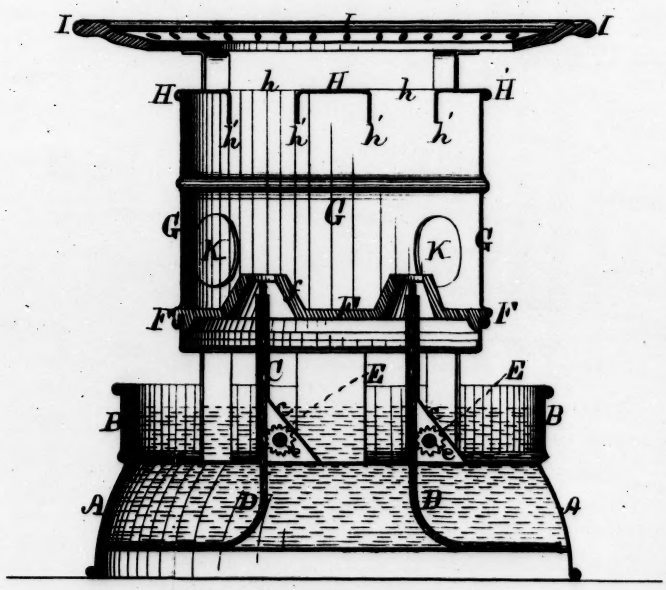
3 Sheets--Sheet 3.

J. A. FREY.

Coal-Oil Stoves.

No. 156,149. Patented Oct. 20, 1874.

Fig. 3.



WITNESSES.

Jas. E. Hutchinson

John R. Young

INVENTOR.

John A. Frey, by

Prindle and Deane, his attys

PLACE, N.Y.

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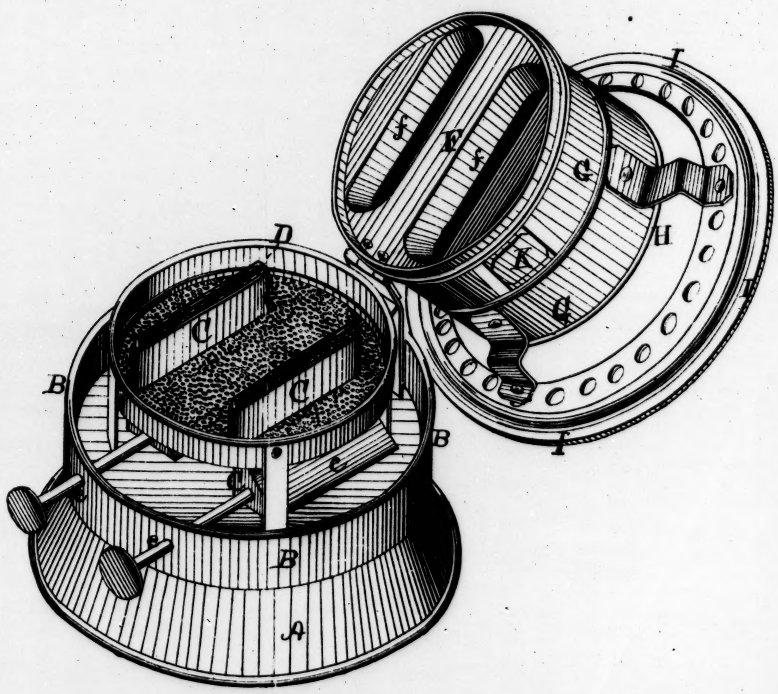
3 Sheets--Sheet 2.

J. A. FREY.

Coal-Oil Stoves.

No. 156,149. Patented Oct. 20, 1874.

Fig. 2.



WITNESSES:

Jas. E. Hutchinson

John R. Young

INVENTOR.

John A. Frey, by

Prindle & Deane, his Attys

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3 Sheets—Sheet 3.

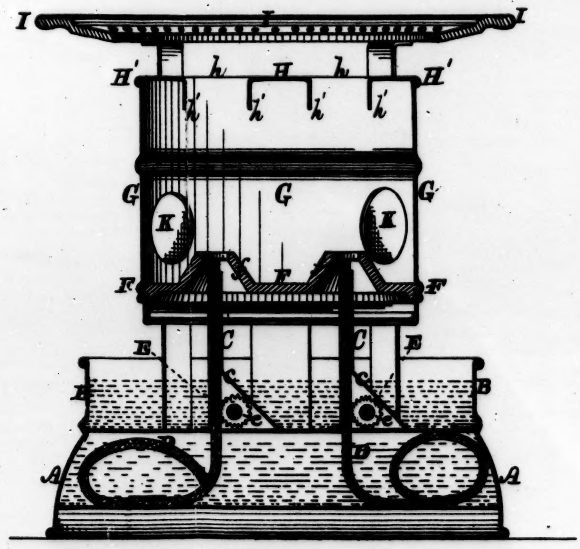
J. A. FREY,

Assignor to C. Riessner & Co.

COAL-OIL STOVE.

No. 7,751. Reissued June 19, 1877.

Fig. 3.



WITNESSES.
Jas. C. Hutchinson
Henry C. Hazard

INVENTOR.
John A. Frey, by
Munn & Co his Attys

N. PETERS PHOTO-LITHOGRAPHER, WASHINGTON, D. C.

20

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3 Sheets—Sheet 2.

J. A. FREY,

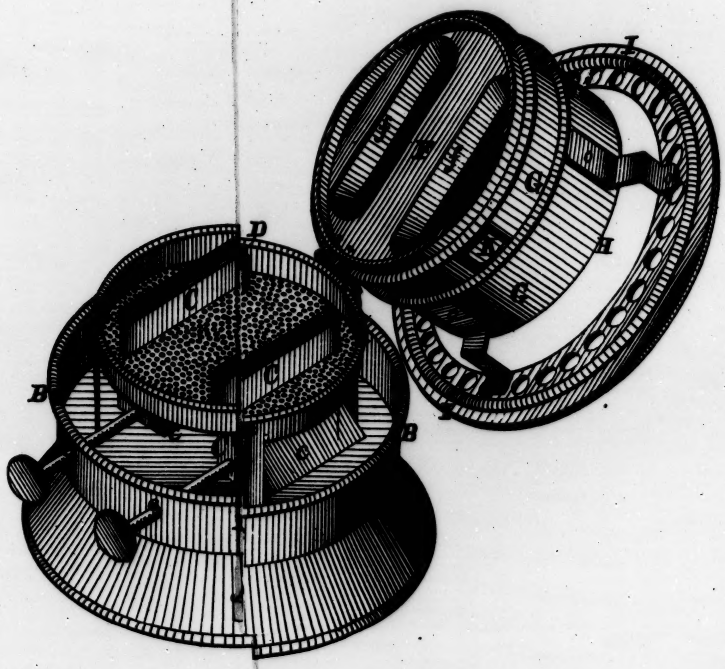
Assignor to C. Riessner & Co.

COAL-OIL STOVE.

No. 7,751.

Reissued June 19, 1877.

Fig. 2.



WITNESSES.

Jas. C. Hutchinson.

Henry C. Hazard

INVENTOR.

John A. Frey, by

Pindle and Le Fiz Attys.

N. PETER
PHOTO-LITHOGRAPHER, WASHINGTON, D. C.

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3 Sheets—Sheet 1.

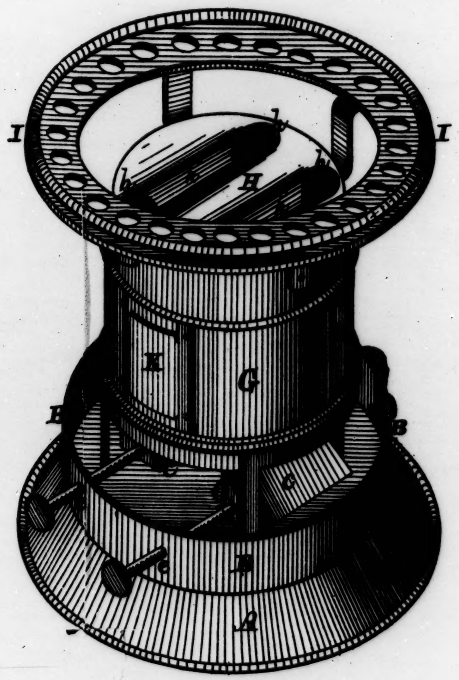
J. A. FREY,

Assignor to C. Riessner & Co.

COAL-OIL STOVE.

No. 7,751. Reissued June 19, 1877.

Fig. 1.



WITNESSES:
Jas. E. Hutchinson.
Henry C. Hazard.

INVENTOR.
John A. Frey, by
Brindle & Quincy Attys

N. PETERS, PHOTO-LITHOGRAPHER, WASHINGTON, D. C.

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UNITED STATES PATENT OFFICE.

JOHN A. FREY, OF NEW YORK, N. Y., ASSIGNOR, BY MESNE ASSIGNMENTS, TO C. RIESSNER & CO., OF SAME PLACE.

IMPROVEMENT IN COAL-OIL STOVES.

Specification forming part of Letters Patent No. 156,149, dated October 20, 1874; reissue No. **7,751**, dated June 19, 1877; application filed May 24, 1877.

To all whom it may concern:

Be it known that I, JOHN A. FREY, of New York, New York county and State of New York, did invent certain new and useful Improvements in Coal-Oil Stove, for which Letters Patent No. 156,149 were issued to me upon the 20th day of October, 1874, which Letters Patent having been found defective, in that the specification and claims do not cover and embrace all of the original invention, as set forth in the application filed in the Patent Office on the 8th day of July, 1874:

Now, therefore, being desirous of reissuing said Letters Patent, herewith surrendered, I have prepared and do hereby declare that the following is a full, clear, and exact description of the said invention, reference being had to the accompanying drawings, making a part of this invention, in which—

Figure 1 is a perspective view of my stove as arranged for use. Fig. 2 is a like view of the same with the upper hinged portion turned to one side so as to uncover the wick-tubes, and Fig. 3 is a vertical central section upon a line having a right angle to said tubes.

Letters of like name and kind refer to each part in each of the figures.

My invention is an improvement upon a similar device which has before been manufactured and sold by me, and which is protected by several patents; and it consists, principally, in a coal-oil stove having its wick-wheels, wick-wheel shafts, and the entire upper surface of its oil-reservoir covered by a water-reservoir, substantially as and for the purpose hereinafter specified. It consists, further, in a coal-oil stove in which the entire upper surface of its oil-reservoir is protected by a water-reservoir, and its wick-wheels and their shafts are inclosed by means of housings that are within said water-reservoir, and below its upper edge, substantially as and for the purpose hereinafter shown. It consists, finally, in the peculiar construction of the funnel or chimney and its combination with the wick-tubes, substantially as and for the purpose hereinafter set forth.

In the annexed drawings, A represents a reservoir for containing oil, which reservoir has, preferably, downward and outward flaring sides, and at its upper side and outer edge is inclosed by means of an annular flange, B, that has a height of about one and one-half inch, and is used to contain water for receiving the heat radiated downward from the burners, so as to prevent the same from being communicated to the oil.

From the reservoir A, two tubes, C and C, extend upward to the required distance, and serve to contain wicks D and D, of usual shape. Said wicks are moved vertically by means of star-wheels, E and E, which latter are secured upon and rotate with suitable shafts, *e* and *e*.

In order that the wick-wheel shafts *e* and *e* may be prevented from becoming warped by the action of the heat so as thereby to change the relative positions of the wick and engaging-wheel, said wheels are located within a suitable housing, *c*, below the water-line, while said shafts are each contained within a tube, *c'*, that at its inner end communicates with said housing *c*, and at its outer end passes through the flange B that forms the outer wall of the water-reservoir, by which means a perfect protection is afforded and all liability to derangement is avoided.

Above and around the upper ends of the wick-tubes C and C is placed a cap, F, that is provided with cone-shaped kerbs *f* and *f*, one of which coincides with each of said tubes and permits the flame of the burning oil to pass upward from the wick.

From the cap F, which is preferably constructed from cast metal, a sheet-metal cylinder, G, extends upward about seven inches, and at its upper end is inclosed by a metal head, H, which latter is provided with two openings, *h* and *h*, that coincide in position with the wick-tube kerbs *f* and *f*, but have considerably larger horizontal dimensions.

From each side of each opening *h* a flange, *h'*, extends downward, and causes the heated escaping gases to be deflected toward the ends of said opening, instead, as would otherwise be the case, of passing outward, principally at the longitudinal center of the same.

The cylinder G, cap F, and head H, which form the chimney of the lamp, are hinged so

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UNITED STATES PATENT OFFICE.

JOHN A. FREY, OF NEW YORK, N. Y., ASSIGNOR, BY MESNE ASSIGNMENTS, TO C. RIESSNER & CO., OF SAME PLACE.

IMPROVEMENT IN COAL-OIL STOVES.

Specification forming part of Letters Patent No. 156,149, dated October 20, 1874; reissue No. **7,751**, dated June 19, 1877; application filed May 24, 1877.

To all whom it may concern:

Be it known that I, JOHN A. FREY, of New York, New York county and State of New York, did invent certain new and useful Improvements in Coal-Oil Stove, for which Letters Patent No. 156,149 were issued to me upon the 20th day of October, 1874, which Letters Patent having been found defective, in that the specification and claims do not cover and embrace all of the original invention, as set forth in the application filed in the Patent Office on the 8th day of July, 1874:

Now, therefore, being desirous of reissuing said Letters Patent, herewith surrendered, I have prepared and do hereby declare that the following is a full, clear, and exact description of the said invention, reference being had to the accompanying drawings, making a part of this invention, in which—

Figure 1 is a perspective view of my stove as arranged for use. Fig. 2 is a like view of the same with the upper hinged portion turned to one side so as to uncover the wick-tubes, and Fig. 3 is a vertical central section upon a line having a right angle to said tubes.

Letters of like name and kind refer to each part in each of the figures.

My invention is an improvement upon a similar device which has before been manufactured and sold by me, and which is protected by several patents; and it consists, principally, in a coal-oil stove having its wick-wheels, wick-wheel shafts, and the entire upper surface of its oil-reservoir covered by a water-reservoir, substantially as and for the purpose hereinafter specified. It consists, further, in a coal-oil stove in which the entire upper surface of its oil-reservoir is protected by a water-reservoir, and its wick-wheels and their shafts are inclosed by means of housings that are within said water-reservoir, and below its upper edge, substantially as and for the purpose hereinafter shown. It consists, finally, in the peculiar construction of the funnel or chimney and its combination with the wick-tubes, substantially as and for the purpose hereinafter set forth.

In the annexed drawings, A represents a reservoir for containing oil, which reservoir has, preferably, downward and outward flaring sides, and at its upper side and outer edge is inclosed by means of an annular flange, B, that has a height of about one and one-half inch, and is used to contain water for receiving the heat radiated downward from the burners, so as to prevent the same from being communicated to the oil.

From the reservoir A, two tubes, C and C, extend upward to the required distance, and serve to contain wicks D and D, of usual shape. Said wicks are moved vertically by means of star-wheels, E and E, which latter are secured upon and rotate with suitable shafts, *e* and *e*.

In order that the wick-wheel shafts *e* and *e* may be prevented from becoming warped by the action of the heat so as thereby to change the relative positions of the wick and engaging-wheel, said wheels are located within a suitable housing, *c*, below the water-line, while said shafts are each contained within a tube, *c'*, that at its inner end communicates with said housing *c*, and at its outer end passes through the flange B that forms the outer wall of the water-reservoir, by which means a perfect protection is afforded and all liability to derangement is avoided.

Above and around the upper ends of the wick-tubes C and C is placed a cap, F, that is provided with cone-shaped kerbs *f* and *f*, one of which coincides with each of said tubes and permits the flame of the burning oil to pass upward from the wick.

From the cap F, which is preferably constructed from cast metal, a sheet-metal cylinder, G, extends upward about seven inches, and at its upper end is inclosed by a metal head, H, which latter is provided with two openings, *h* and *h*, that coincide in position with the wick-tube kerbs *f* and *f*, but have considerably larger horizontal dimensions.

From each side of each opening *h* a flange, *h'*, extends downward, and causes the heated escaping gases to be deflected toward the ends of said opening, instead, as would otherwise be the case, of passing outward, principally at the longitudinal center of the same.

The cylinder G, cap F, and head H, which form the chimney of the lamp, are hinged so

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as to permit of being turned to one side, as shown in Fig. 2. An elevated support, I, for cooking utensils is secured to the upper end of said cylinder, and a number of glazed openings, K and K, are provided in the sides of the latter, completing the apparatus, the operation of which will be readily understood from the foregoing description.

It will be seen that, in consequence of the construction and arrangement of the water-reservoir and of the housings for the wick-wheels and their shafts, a perfect protection from heat is secured for said parts and for the oil-reservoir beneath.

Having thus fully set forth the nature and merits of my invention, what I claim as new is—

1. A coal-oil stove having its wick-wheels, wick-wheel shafts, and the entire upper surface of its oil-reservoir covered by a water-reservoir, substantially as and for the purpose specified.

2. A coal-oil stove in which the entire upper surface of its oil-reservoir is protected by a water-reservoir, and its wick-wheels and their shafts are inclosed by means of housings that are within said water-reservoir and below its upper edge, substantially as and for the purpose shown.

3. The combined cap and chimney, consisting of the cap F, provided with kerbs *f* and *f*, the sheet-metal cylinder G, and the head H, provided with the openings *h* and *h*, and flanges or flue-plates *h'* and *h'*, depending from the sides only of said openings, said parts being constructed and combined to operate in the manner and for the purpose substantially as set forth.

In testimony that I claim the foregoing I hereunto set my hand this 10th day of May, A. D. 1877.

JOHN A. FREY.

Witnesses:
ADAM RIESSNER,
EDWARD COLEEL.

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J. ALLEN.

Keeping Oil Cool in Lamps.

No. 50,087. Patented Sept. 26, 1865.

FIG. 1

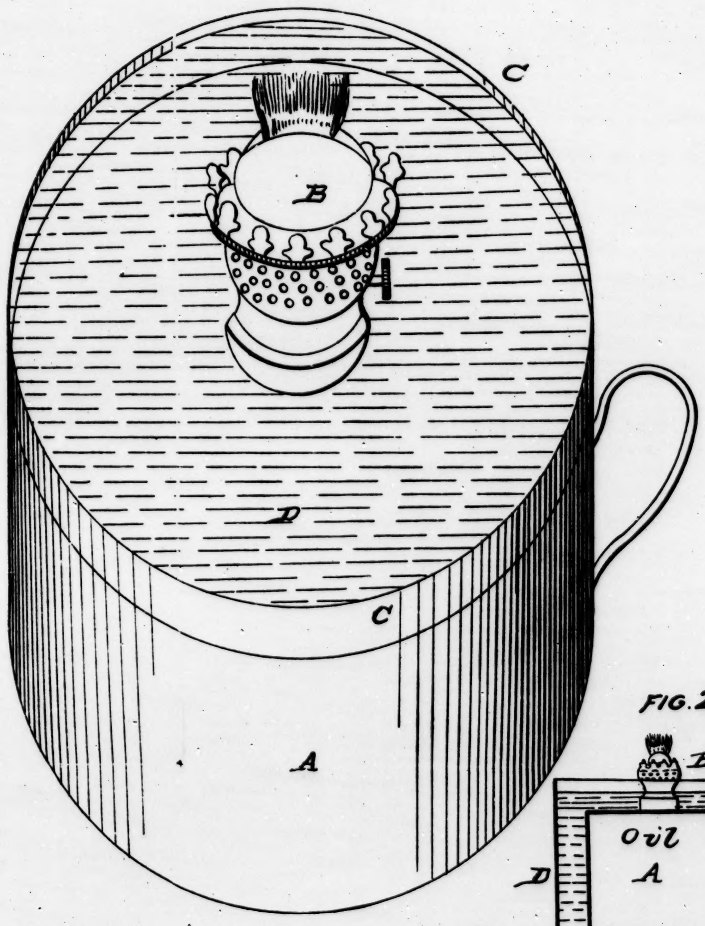
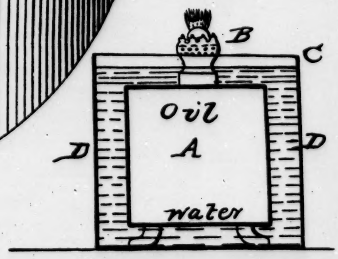


FIG. 2



WITNESSES

J. Frankhuister-gard

Daniel Rogarty

INVENTOR

John Allen M.D.

25

UNITED STATES PATENT OFFICE.

JOHN ALLEN, M. D., OF WASHINGTON, DISTRICT OF COLUMBIA.

IMPROVEMENT FOR KEEPING OIL COOL IN LAMPS OR BURNERS.

Specification forming part of Letters Patent No. **50,087**, dated September 26, 1865.

To all whom it may concern:

Be it known that I, J. ALLEN, M. D., of the city of Washington, District of Columbia, have invented a new Mode of Keeping Cool the Contents of a Lamp or Burner; and I do hereby declare the following to be a full and exact description thereof, reference being had to the accompanying drawing, and to the letters of reference marked thereon, making a part of this specification.

The nature of my invention consists in placing an open reservoir or shallow basin of water between or around the vessel or reservoir that contains the fluid and the flame above, for the purpose of increasing the flame, making the flame burn steady and regular, cooling the tube or conductor that holds the wick, and preventing the generating of gas between the combustible fluid and the flame, so that an explosion will be prevented.

A represents a vessel containing the oil or fluid; B, the tube and wick above. Around the top edge of the vessel A, I have a raised rim or flange, C, either straight or curved, so that it forms an open basin or upper reservoir, D. This basin is filled with cool water. The wick is then lighted and the collar of the lamp and wick-tube are kept cool by the water surrounding the bottom of the collar and tube and the top of the vessel A is kept cool by the body of water at top, so that gas cannot be generated in the vessel A. The air continually passing over the water at top keeps the water cool, and the wick burns more steadily and does not flicker or flare or be so easily extinguished by a sudden draft of air; or the oil-vessel A may be wholly surrounded by water, as shown at Fig. 2, for the purpose of keeping cool the contents of the vessel A.

What I claim as my invention, and desire to secure by Letters Patent, is—

The placing of water on the top or around the reservoir A, as herein described, and for the purposes set forth.

JOHN ALLEN, M. D.

Witnesses:

J. FRANKLIN REIGART,

EDM. F. BROWN.

27

W. B. BILLINGS.

Coal Oil Lamp for Cooking Purposes.

No. 50,892. Patented Nov. 14, 1865.

Fig. 1.

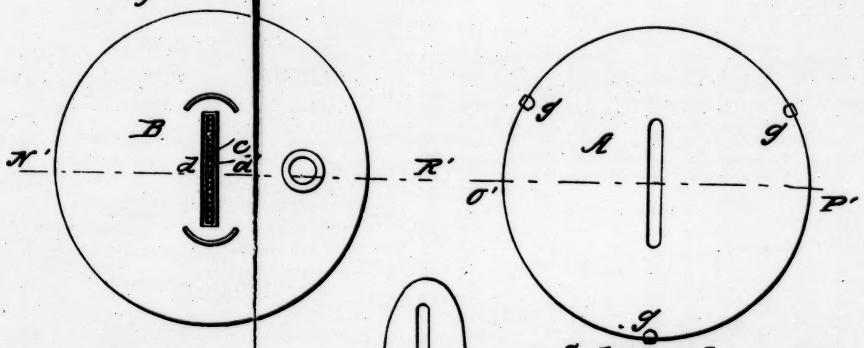
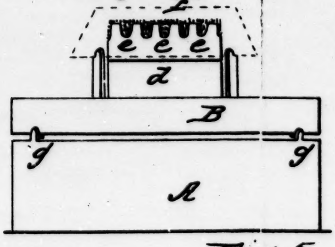


Fig. 3.



Sections on lines N'N' C'P':

Fig. 4.

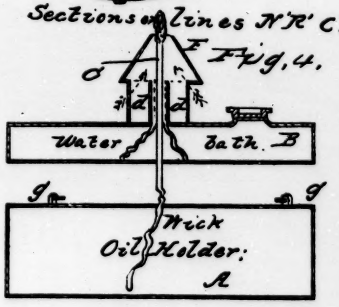
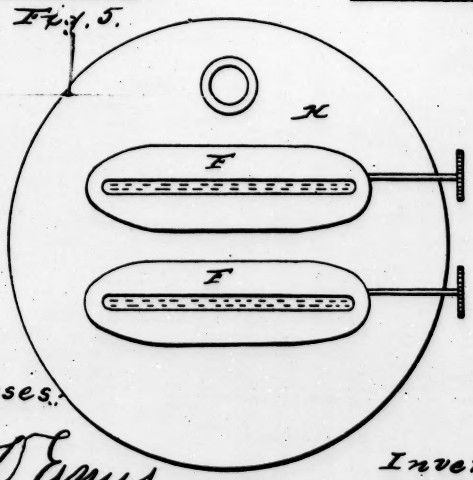


Fig. 5.



Witnesses:

Chas. D. Eames

Barry Fox

Inventor:

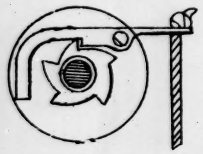
W. B. Billings

N. PETERS. Photo-Lithographer. Washington, D. C.

27

A.D 1848 Dec. 16 No
SMITHS' SPECIFICATION

FIG. 1.



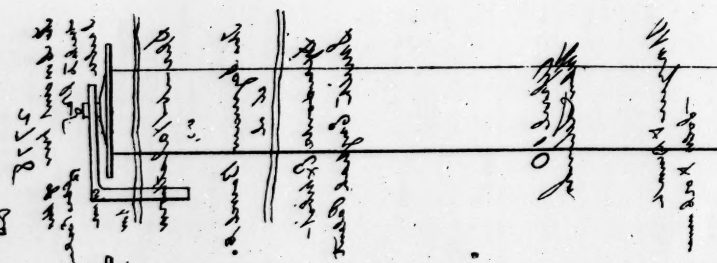


FIG. 2.

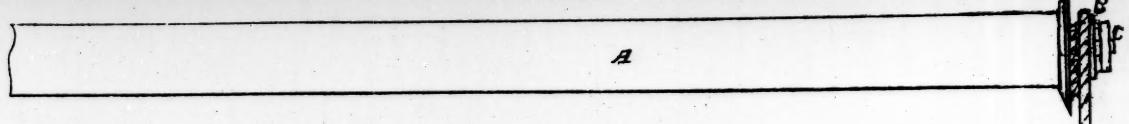


FIG. 3.

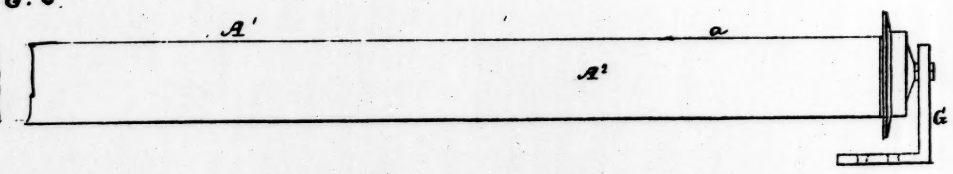


FIG. 4.

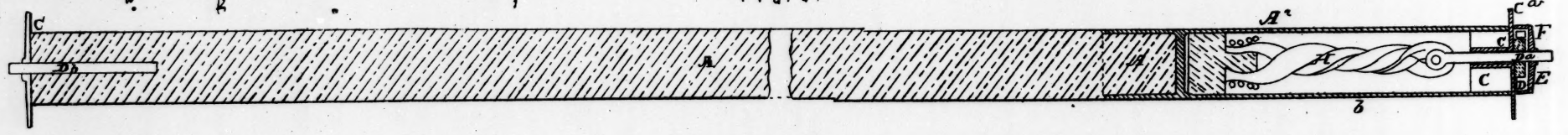


FIG. 5.

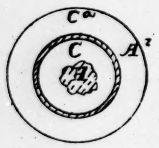


FIG 5 A

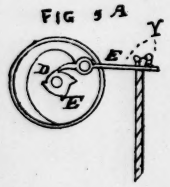
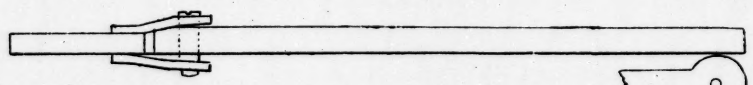


FIG. 6.



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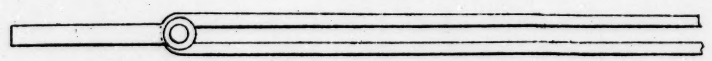


FIG 8

FIG 9

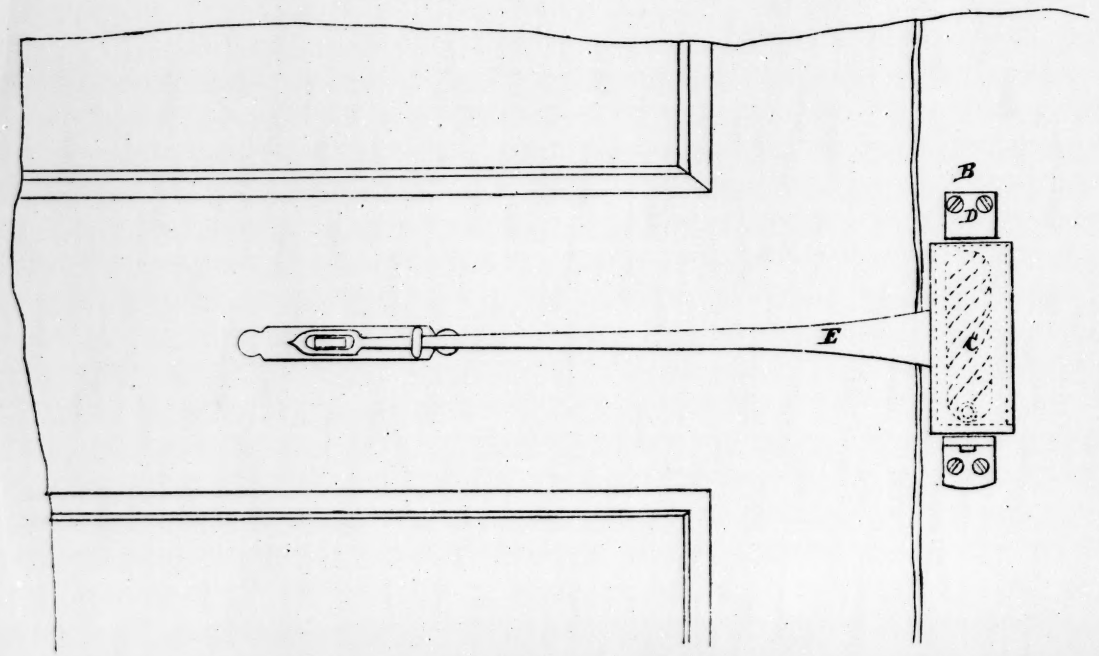
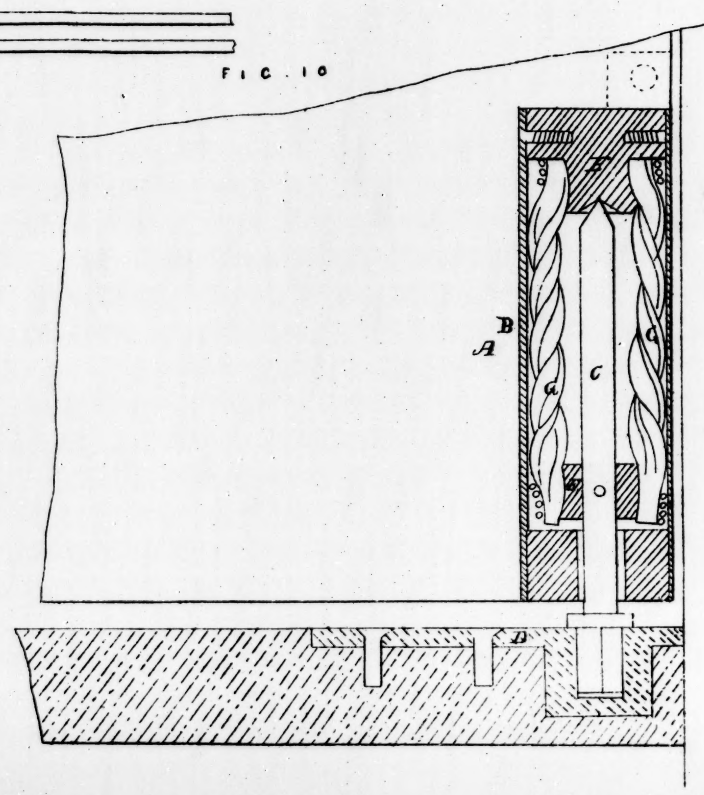


FIG. 10



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